89-1240

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ANTHONY WAYNE THOMPSON,

Petitioner,

v.

CHERYL L. DUKE, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Do parole officials and parole officers enjoy absolute, quasi-judicial immunity for their administrative conduct in an action for damages under 42 U.S.C. §1983, in view of this Court's decision in *Forrester v. White* denying absolute immunity to judges for their administrative conduct?

2. Is a parolee who is found not guilty at trial on a new criminal charge denied due process of law when he is returned to jail, after that acquittal, without a prompt *Morrissey v. Brewer*, or preliminary parole hearing, pursuant to a parole violation warrant that was issued before that trial solely on the basis that the parolee had been arrested on that new criminal charge?

   (a) are parole officials and administrators liable under 42 U.S.C. §1983 where they knew, prior to this occurrence, that parolees were being returned to jail without prompt *Morrissey v. Brewer* hearings, and such officials and administrators were directed, as an administrative matter, to solve this problem, which they did not do?

   (b) are county jail officials and personnel liable under 42 U.S.C. §1983 where they returned petitioner to jail after he was found not guilty on a new criminal charge after a trial?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Anthony Wayne Thompson and respondents Cheryl L. Duke, Chester J. Pucci, Floyd Cox, Robert Guthrie, Rita Allen, Harold Thomas, Michael Lane, Paul J. Klincar, Philip T. Hardiman, Roy Patrick and The County of Cook. These are the parties to this petition.

Additional parties to the proceedings below that are not parties to this petition are Rownie H. Brown, M.D., Elliott C. Roberts, Sr., Dr. Alan Freint, Dr. William Powell and Dr. James Oddie. These parties were joined below on the basis of the medical treatment received by the petitioner.

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ANTHONY WAYNE THOMPSON,

Petitioner,

v.

CHERYL L. DUKE, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Anthony Wayne Thompson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on August 14, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 882 F.2d 1180, and is reprinted with that Court's judgment in the appendix hereto, pp. 1-18, *infra*.

The memorandum opinion of the United States District Court for the Northern District of Illinois (Grady, J.) has not been reported. It is reprinted in the appendix hereto, pp. 19-34. *infra*.

JURISDICTION

Petitioner brought this action in the United States District Court for the Northern District of Illinois, invoking federal jurisdiction under 42 U.S.C. §1983, 28 U.S.C. §1331, 28 U.S.C. §1332 and 28 U.S.C. §1343. On December 29, 1987, the District Court issued a memorandum opinion and judgment order granting respondents' motions for summary judgment on petitioner's federal claims, and dismissing petitioner's state law claims for lack of federal jurisdiction.

Petitioner appealed to the Seventh Circuit, pursuant to 28 U.S.C. §1291. The Court of Appeals affirmed the judgment of the District Court on August 14, 1989. No petition for rehearing was filed.

On November 6, 1989, Justice Stevens ordered that the time for filing this petition for writ of certiorari be extended to and including January 11, 1990 (App. 35).

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution Of The United States

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code: 42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

STATEMENT OF THE CASE

This case involves the due process rights of a parolee returned to jail after acquittal on a new criminal charge, who was neither released upon that acquittal nor provided a prompt preliminary parole hearing pursuant to *Morrissey v. Brewer*, 408 U.S. 471 (1972). This case also involves the level of immunity enjoyed by parole board members, parole officials, parole administrators and parole officers when damage actions such as this one are brought under 42 U.S.C. §1983. The events in question occurred in Illinois, and began there more than a year before petitioner was arrested on that new criminal charge.

In Illinois, parolees were referred to as a parolee, releasee or parolee/releasee. Respondent Harold Thomas was a parole administrator, known as a Superintendent, in the Illinois Department of Corrections on March 10, 1981. On that date, respondent Thomas received a memorandum from Anthony Scillia, the Deputy Director of the Community Services Division of the Illinois Department of Corrections. The subject of that memorandum was: "Morrissy Brewer Hearing." Deputy Director Scillia informed respondent Thomas that it had come to Scillia's "**attention *again* that Morrissey Brewer hearings [were] not being conducted on several releasees . . . returned to a correctional center**" (HT Ex. 1; App. 36) (emphasis added). The memorandum noted that ". . . an attorney is ready to sue the Department on this issue. . . .", and directed respondent Thomas to ". . . **immediately solve this *problem once and for all.***" (emphasis added). Respondent Lane, the Acting Director of the Illinois Department of Corrections, was also sent a copy of that memorandum.

On April 1, 1981, respondent Thomas wrote back to Deputy Director Scillia on the subject of "Morrissy Brewer Hearings." Respondent Thomas assured Scillia that Thomas was ". . . addressing the problem of releasees being returned without Morrissy Brewer Hearings . . ." (App. 37).

On February 23, 1982, petitioner was released in Indiana on parole (Ex. A; A. 618) after serving approximately seven and one-half months at the Indiana Youth Center and four and one-half months in the County Jail (AT pp. 13-14; A. 463-464).[1] Petitioner was permitted to move to Chicago, Illinois under the Interstate Parole and Probation Compact which is generally referred to as the Parole Reciprocal Agreement (RA pp. 7-8; A. 236-237). Petitioner sought and obtained gainful employment in Chicago immediately after his release (AT p. 14; A. 464). On July 29, 1982, petitioner was arrested by officers of the Chicago Police Department in Chicago, Illinois, and subsequently charged with burglary (Ex. A; A. 618). On July 30, 1982, the petitioner was transferred from the local precinct office and incarcerated in the Cook County Department of Corrections (AT pp. 36-37; A. 467-468).

Also on July 30, 1982, respondents Cheryl L. Duke and Chester J. Pucci issued parole violation warrant #NS

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[1] Citations to the appendix to this petition will be identified as (App. ____). Citations to the depositions and answers are indicated by the initials of the deponent followed by the page numbers cited. The pages were included with plaintiff's materials in opposition to the motions for summary judgment. The relevant pages and documents are also cited to the appendix filed in the Court of Appeals as (A. ____). The identity of the deponents is set forth below:

Rita Allen	RA	Floyd Cox	FC
Anthony Thompson	AT	Robert Guthrie	RG
Harold Thomas	HT	Chester Pucci	CP

823198 (A. 622) against the petitioner (CP Answer to Count III, Par. 10 of Complaint) (A. 10). The parole violation warrant was issued solely as a result of the burglary arrest on July 29, 1982, which allegedly violated the condition of the petitioner's parole which required him to obey certain laws and ordinances (App. 44, 45).

Respondents Duke and Pucci were employed by the Illinois Department of Corrections (CP pp. 9-13; A. 522-526). Respondent Duke was petitioner's parole officer and respondent Pucci had supervisory duties over respondent Duke (*Id.* at 13; A. 522). Respondent Pucci's duties and responsibilities included monitoring the status of criminal proceedings in which parolees were involved, keeping abreast of parolees' court dates, and ensuring that the parolees were served with notice of the charges against them and afforded their constitutionally required preliminary parole revocation hearing (*Id.* at 14-20; A. 527-533).

On August 6, 1982, the parole violation warrant and the information contained therein appeared on the computer in the Interstate Compact Office (RA p. 27; A. 238). As Interstate Compact Administrator, respondent Rita Allen was responsible for parolees such as the petitioner who were transferred from another state to Illinois and who subsequently were alleged to have violated their parole (RA pp. 6-8, 49-50; A. 235-237, 246-247). Respondent Allen was responsible for ensuring that the preliminary parole revocation hearing requirements were met with regard to parolees under her direct control such as the petitioner (RA p. 54; A. 251).

On August 12, 1982, a preliminary hearing was held in the burglary case, to determine whether petitioner should be bound over for trial, at which time no witnesses testified on the petitioner's behalf and the petitioner presented no evidence (AT pp. 37-38; A. 468-469). The burglary case

was continued on September 2, 1982 for arraignment before the presiding Judge of the Criminal Division (Dfdt. Memorandum in Support of Motion for Summary Judgment p. 2; Ex. J; A. 630). Petitioner was returned to Cook County Jail (AT pp. 36-38; A. 467-469).

On August 31, 1982, Information No. 82 T161 was filed in the burglary case by the People of the State of Illinois against the petitioner charging him with the offense of burglary (Dfdt. Memorandum in support of Motion for Summary Judgment p. 2; Ex. J; A. 630). The trial in the burglary case was scheduled for September 20, 1982. The computer run in the security office of Division 5 of the Cook County Jail indicated when the scheduled criminal trial of the petitioner was to take place (RP p. 43; A. 369). Any of the employees working under respondent Patrick, a county jail administrator, had access to the computer in the security office (RP p. 44; A. 370). Respondent Patrick or any of his subordinate officers could easily have obtained information concerning the trial date of the petitioner. In general, the reception center at the Cook County Jail notifies the security office of all inmates that are scheduled to go to Court (RP p. 33; A. 362). The subordinates of respondents Hardiman and Patrick prepare these inmates for court and send them to the reception center (RP pp. 33-34; 362-363). Both the movement roster and the security count book contain, by date, notations concerning inmates leaving to go to court (RP p. 84; A. 390).

On September 13, 1982, respondent Robert Guthrie delivered a violation package containing the notice of charges, parole violation report, police report, and rap sheet to the petitioner (App. 45) (HT p. 6; A. 434; FC p. 54; A. 572). ***Respondent Guthrie scheduled the plaintiff's parole hearing for September 21, 1982, one day after the burglary trial was to be held*** (Ex. K; A. 632). At all times rele-

vant to this case, respondent Guthrie was a hearing officer employed by the Illinois Department of Corrections and responsible for providing the petitioner with written notice of charges that he allegedly violated the conditions of his parole, and for conducting a preliminary hearing to determine whether probable cause existed to believe a violation of parole occurred (RGu Answer to Count VII, Par. 39 of Complaint; A. 10). Respondent Harold Thomas, Guthrie's supervisor, had placed Guthrie in the Cook County Department of Corrections in order to schedule and conduct preliminary hearings (HT pp. 29-30; A. 446-447). As Guthrie's supervisor, Thomas was responsible for ensuring that the preliminary hearing proceeded after it had been scheduled (*Id.* at 25, 30; A. 444, 446). Guthrie, as a hearing officer, worked in the Illinois Department of Corrections' liaison office located in the Cook County Department of Corrections (RG pp. 10-11, 21-22; A. 596-597, A. 605-606).

On September 15, 1982, Defendant Rita Allen, at the Interstate Compact Office, received the parole violation report (Ex. B; A. 619) and the data on the report was subsequently noted on the petitioner's mastercard, the only document in the office containing data on interstate transfer parolees (RA pp. 31-34; A. 242-245). The information on the computer and petitioner's alleged parole violation were the only reason in support of the warrant's issuance, namely the burglary charge (*Id.* at 30-31; A. 241-242). A copy of the parole violation report was also on file at the Liaison Office and thus gave notice to workers out of that Illinois Department of Corrections outlet that the burglary charge was the sole basis for the petitioner's parole violation warrant.

On September 20, 1982, a contested bench trial was held in the burglary case before Judge Fred Suria of the Criminal Division of the Circuit Court of Cook County. Judge

Suria found the petitioner not guilty of the aforesaid burglary charge or any other offense (A. 209). Following his acquittal on the burglary charge, the petitioner was returned to and incarcerated in the Cook County Jail (Dftds. Memorandum in support of Motion for Summary Judgment p. 3; Pltf. Ex. J; A. 631). He was placed in a cell in the general prison population and treated as an inmate.

When the petitioner was acquitted of the burglary charge, a notation of "not guilty" was placed on his personal history card, located in the records office at the Cook County Jail (Ex. E; A. 624). Hearing officers can easily enter the records office at Cook County Jail and read the disposition of a parolee's criminal charge (FC pp. 87-89; A. 582-584; RG p. 49; A. 615). In addition, the parole agents can obtain the results of the parolees' Court appearances from the warrant log in respondent Pucci's office (CP pp. 38-40; A. 534-536).

The petitioner protested to Cook County Jail officers that he was wrongfully incarcerated, but his protests were ignored (Pltfs. affid Par. 1; A. 633). The petitioner also requested to see a member of the Parole Board, knowing that he was entitled to a preliminary hearing (AT p. 49; A. 476). This request was also ignored. Respondent Hardiman was responsible for the content and manner of the officers' training (PH pp. 20-21; A. 310-311). Respondent Patrick was responsible for the supervision of the officers in Division 5 (RP pp. 5-6; A. 359-360). Both respondents were responsible for the safe care and custody of inmates incarcerated in Division 5 of the Cook County Jail (RP p. 6; A. 360, PH pp. 5-7). The respondents did not train their subordinate officers to respond to a protest such as "I do not belong here", "there is no legal basis for my incarceration", or "I am supposed to have a parole hear-

ing and I have not had one" (PH pp. 42-43; A. 326-327). The personal history cards are located in the records office at the Cook County Jail. The correctional officers are familiar with the cards and their location. They are taught what type of information is found on a history card. The officers are also taught that if the need arises they can find out information from looking at the history card. In order to gain access to the history card, an officer need only obtain a request from their shift commander or show some specific need to go to the records office (RP pp. 65-66; A. 382-383).

When the petitioner was acquitted, the burglary charge on the reception center's computer was deleted (PH pp. 36-38; A. 322-324). Because a parole hold is treated as another charge, the hold remained on the computer despite the acquittal on the charge on which that parole hold was based (PH pp. 36-38; A. 322-324).

Prior to the trial on September 20, 1982, the petitioner's preliminary parole or release violation hearing was scheduled for September 21, 1982 (HT p. 6; A. 434) (Ex. K; A. 632). The correctional officers' training does not include material concerning the rights of prisoners on parole hold to have preliminary probable cause hearings within a certain time after they have been incarcerated (PH p. 23; A. 313). The county jail officials supposedly defer to the Illinois Department of Corrections for all matters concerning the parole hearings except that they arrange to take the prisoners to and from the hearings (PH pp. 24-26; A. 314-316).

Both respondents Hardiman and Patrick were aware that the Illinois Department of Corrections' Officers held hearings at the Cook County Jail (PH pp. 61-62; A. 337-338; RP p. 54; A. 375). It was a Cook County Jail policy

to cooperate as far as making inmates available for the hearings and supplying a room in which the hearings could be conducted (PH pp. 62-64; A. 338-340).

Respondent Robert Guthrie, who was responsible for conducting the petitioner's hearing the day after petitioner's burglary trial, (HT p. 30; A. 446) and whose duty it was at the preliminary hearing to inquire into the status of any pending criminal charges (*Id.* at 21; A. 440), did not do so. Guthrie did not hold the petitioner's preliminary hearing on its scheduled date of September 21, 1982 (Dftds. Memorandum in Support of Motion for Summary Judgment p. 3; Ex. J; A. 631). Guthrie's "only relief man" (FC p. 35; A. 563) also did not hold plaintiff's preliminary hearing on its scheduled date (*id.*; A. 563). Respondent Floyd Cox was employed by the Illinois Department of Corrections as a reserve hearing officer (FC Answer to Count V, Par. 34 of Complaint; A. 51). When respondent Guthrie became sick or took a vacation for an extended period of time, respondent Thomas would inform defendant Cox that he was to conduct preliminary hearings for specific parolees (FC pp. 32-33, 39-40; A. 560-561, 564-565). Respondents Cox and Guthrie admitted that where a parolee is first charged with and later acquitted of a property offense, that parolee's preliminary hearing receives top priority because there may exist no other reason to hold that parolee based on the notice of charges (*Id.* at pp. 51-52; A. 569-570; RG p. 59; A. 617). The petitioner fell into this category of parolees charged with and later acquitted of property offenses, yet neither Guthrie nor Cox held the hearing as scheduled on September 21, 1982.

Respondent Chester Pucci was admittedly responsible for monitoring the status of criminal proceedings in which parolees were involved (CP p. 14; A. 527). To facilitate the fulfillment of his duty to monitor, a notation in the

warrant log maintained in Pucci's own office indicated the results of the parolees' criminal proceedings (*Id.* at pp. 57-58; A. 5).

Yet the hearing scheduled for September 21, 1982 never transpired and the petitioner remained incarcerated. While incarcerated, on September 24, 1982, at approximately 7:45 p.m., petitioner was severely beaten by another inmate in the head and face (AT pp. 70-72; A. 481-483). While crouched in a kneeling position on the floor and playing cards with other individuals, another inmate kicked the petitioner in the face. The petitioner did not attempt to strike back, but covered his head with his hands while receiving numerous blows from the inmate's fists and feet (*Id.*). The petitioner's injuries included a fractured orbital rim and zygomatic arch, and required immediate medical attention and surgery. The plaintiff was taken to Cermak Health Services where he saw a doctor (*Id.* at pp. 86-87; A. 484-485). The doctor gave instructions to take the petitioner to Cook County Hospital because he needed emergency medical treatment (*Id.* at p. 87; A. 485).

After arriving at Cook County Hospital, petitioner was chained to his hospital bed. This restraint continued from September 25, 1982 to his discharge, except when he went to the bathroom, at which time the officers handcuffed him to his I.V. pole (AT pp. 105-107; A. 496-498).

When the attending physicians performed surgery, they failed to diagnose a visible infection surrounding the petitioner's fracture, and placed a foreign object in the petitioner's face, which spread the infection. Worse yet, those physicians while performing surgery, broke a drill bit and left it dangerously near the petitioner's brain, concealing this latter fact from the plaintiff (A. 281-284, 287). The spread of the plaintiff's infectious process caused a perior-

bital abscess and chronic osteomyelitis. Further surgery was necessitated as a result of petitioner's injuries.

The petitioner remained hospitalized from September 25, 1982 to October 19, 1982. At any time during this period, with the exception of during surgery, either defendant Guthrie or Cox could have held the preliminary hearing at Cook County Hospital (FC pp. 104-105, 115-116; A. 588-589, 590-591). Hearings are held at the hospital if the particular parolee is sick or injured (*Id.*).

On October 18, 1982, respondent Thomas withdrew petitioner's parole violation warrant by virtue of his acquittal on the burglary charge (App. 46). Nevertheless, on October 19, 1982, the plaintiff was transferred from Cook County Hospital to Cook County Jail, at which time the petitioner's preliminary parole hearing was purportedly held. On that date, respondent Floyd Cox allegedly found that no probable cause existed to indicate that the petitioner had violated any condition of his parole because of petitioner's acquittal (App. 47). But because the parole violation warrant #NS 823198 was withdrawn the day before that so-called hearing (App. 46), the warrant was withdrawn without a hearing. This withdrawal of the parole violation warrant and subsequent release absent a preliminary hearing is not a deviation from standard procedure (HT pp. 52, 55; A. 453, 454; FC pp. 71-75, 101-102; A. 585-586; CP p. 56, pp. 78-81; A. 537, 540-543). In fact, respondent Chester Pucci is responsible, if he learns of information which merits the withdrawal of a parole violation warrant, for initiating the withdrawal process (CP pp. 161-162; A. 547-548). Information in Pucci's warrant log as to the petitioner's acquittal on a charge which was the sole basis for the parole hold's issuance obviously required withdrawal of the warrant.

In addition to holding a position with the Illinois Department of Corrections as supervisor to respondents Guthrie and Cox (RG p. 14; A. 598; HT pp. 22-24; A. 441-443), Harold Thomas, as respondent Pucci's direct superior, oversees the management of the Liaison Office (CP p. 121; A. 544). Respondent Hardiman also was in constant communication with Thomas at all relevant time (PH pp. 60-61; A. 336-337). When respondent Cox purportedly held the petitioner's hearing on October 19, 1982, the basis for his finding that no probable cause existed to believe that the petitioner violated his parole was the acquittal in the burglary case (FC pp. 76-77; A. 580-581). Information readily available to respondents Guthrie, Cox and Pucci on September 20 and September 21, 1982 should similarly have resulted in the petitioner's release on that date.

Petitioner filed suit in the District Court, alleging that his federal constitutional rights were violated in that he was not released upon his acquittal on the new criminal charge, and that he did not receive a prompt preliminary parole hearing pursuant to *Morrissey v. Brewer*, 408 U.S. 471 (1972). Petitioner also alleged that his state law rights were violated. Petitioner invoked the federal claim jurisdiction of the District Court under 42 U.S.C. §1983, 28 U.S.C. §1331 and 28 U.S.C. §1343, and the state law claim jurisdiction under the pendent jurisdiction doctrine and diversity jurisdiction under 28 U.S.C. §1332.

The District Court, after extensive discovery, granted summary judgment to the respondents on the federal claims and dismissed the state law claims for lack of federal jurisdiction (App. 19-34). The District Court ruled that the respondent parole officials and parole officers were absolutely immune from suit for their "administrative" actions. *Id.* at pp. 26-28. The District Court applied Seventh Circuit authority, *Walker v. Prisoner Review Bd.*, 769

F.2d 396 (7th Cir. 1985). In *Walker*, the Seventh Circuit had ruled that absolute immunity applies to all official duties of parole officials ". . . whether or not they may be classified as adjudicatory or administrative." *Walker*, 769 F.2d at 399.

The District Court also granted summary judgment to the county jail personnel, and ruled, *inter alia*, that the county respondents could rely on petitioner's parole violation warrant to return him to jail after his acquittal, even though the sole basis for the issuance of that warrant had been removed by that acquittal.

Petitioner appealed to the Court of Appeals, which affirmed the judgment of the District Court. *Thompson v. Duke*, 882 F.2d 1180 (7th Cir. 1989). Petitioner contended on appeal that this Court's recent decision in *Forrester v. White*, 484 U.S. 219 (1988), precluded absolute immunity for the "administrative" conduct immunized by the District Court. While the Seventh Circuit stated that the scope of any immunity claim depends upon the function performed, the Court of Appeals nevertheless avoided any analysis of the different functions performed by the various parole officials and parole officers who are parties herein. Instead, the Court of Appeals conclusorily decided, in a footnote, that ". . . because all of the defendants played a very similar role in this case, their claims of absolute immunity will either stand or fall as a group." *Thompson v. Duke*, 882 F.2d 1180, 1183 n.3 (7th Cir. 1989).

Without mentioning that the District Court accorded absolute immunity to those parole defendants for their role in "administrative" conduct, the Court of Appeals rejected petitioner's *Forrester* contention. The Court of Appeals was ". . . convinced that *Forrester* may not be read so

broadly." *Id.* at 1183. This crabbed approach to *Forrester* led the Court of Appeals to apply its pre-*Forrester* absolute immunity cases, such as *Walker v. Prisoner Review Bd.*, 769 F.2d 396, 399 (7th Cir. 1985), which rejected the adjudicative/administrative act test that *Forrester* now mandates.

The Court of Appeals also rejected petitioner's contention that *Baker v. McCollan*, 443 U.S. 137 (1979), does not authorize *post-trial* detentions by jailers of acquitted individuals, but rather applies only in the pre-trial investigation context.

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S GRANT OF ABSOLUTE IMMUNITY TO ALL PAROLE OFFICIALS AND PAROLE OFFICERS VIOLATES THIS COURT'S DECISION IN *FORRESTER v. WHITE*.

Any absolute immunity of parole officials or parole officers would be quasi-judicial in nature. Simply put, the absolute immunity of parole officials or parole officers is based upon the absolute immunity of judges. It necessarily follows that the absolute immunity of parole officials or parole officers cannot be any broader than the absolute immunity of judges.

This Court, in *Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538 (1988), held that judges are not entitled to absolute immunity for their administrative conduct. The *Forrester* court further held that judges only enjoyed absolute immunity for their judicial or adjudicative decisions. 108

S. Ct. at 545. Petitioner insisted in the Court of Appeals that the conduct of the parole officials and parole officers in the instant case was administrative in nature. Indeed, petitioner adduced the documentary evidence, set forth above, showing that Illinois parole officials treated the delay in conducting *Morrissey v. Brewer* or preliminary parole hearings as a general administrative problem, to be solved on an administrative level, almost one year before the petitioner became involved with the Illinois parole system. Moreover, petitioner demonstrated in his particular case how parole officials and parole officers treated this problem as an administrative one. Thus, petitioner's parole violation warrant was withdrawn the day before the belated preliminary parole hearing on the basis that petitioner had been acquitted of the burglary charge. While the Court of Appeals in the instant case acknowledged that ". . . the parole violation warrant in fact had been formally withdrawn the day before the hearing . . .", *Thompson*, 882 F.2d at 1181, that court never explained how such a withdrawal constituted an adjudicative act. Nor did the Court of Appeals explain why the failure to conduct the preliminary hearing became an adjudicative function where, as here, the parole violation warrant serving as the basis for such a hearing was withdrawn prior to such a hearing for the same reason that existed when petitioner was found not guilty of burglary. Put another way, there was nothing left for the parole officials to adjudicate after petitioner was acquitted on the burglary charge. The subsequent conduct of those parole officials confirmed that fact.

The District Court in the instant case characterized the conduct of the parole officials and parole officers as "administrative." The District Court concluded nevertheless that the steps leading up to preliminary parole hearings

were necessary to the system and therefore deserving of absolute immunity. But this reasoning was undercut by the *Forrester* court, when that court ruled that such acts ". . . like many others involved in supervising court employees and overseeing the efficient operation of a court—may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative." 108 S. Ct. at 545.

The Court of Appeals recast the *Forrester* holding, and claimed that *Forrester* ". . . confirmed absolute immunity from damages for all acts carried out as a part of the judicial function. Absolute judicial immunity was removed only for that narrow range of purely administrative acts, such as employment decisions, which are unrelated to the judicial function." *Thompson*, 882 F.2d at 1185. Petitioner submits that this narrow reading of *Forrester* cannot be justified. Indeed, the *Forrester* court specifically noted that a county judge selecting trial jurors on the basis of race was not absolutely immune, even though such conduct was essential to the very functioning of the courts. *Forrester*, 108 S. Ct. at 544, citing *Ex Parte Virginia*, 100 U.S. (10 Otto) 339, 25 L. Ed. 676 (1880).

The Court of Appeals advanced a parade of horribles for judges if *Forrester* only immunized adjudicative and judicial decisions. The short answer to such an approach is that the instant case involves parole officials, parole administrators and parole officers in local parole offices. Only by lumping all such parole respondents together in a "group" could the Court of Appeals equate judicial conduct with the conduct of a parole officer in the Uptown parole office in Chicago, Illinois.

This Court has reserved in the past the issue of the extent to which parole officials and parole officers are en-

titled to absolute or qualified immunity. *Martinez v. California*, 444 U.S. 277, 285 n.11 (1980). In view of this Court's rejection of blanket absolute immunity for judges in the *Forrester* case, this Court should consider in the instant case the extent to which parole officials and parole officers are entitled to absolute or qualified immunity.

II.

THERE IS A SIGNIFICANT SPLIT OF AUTHORITY AMONG THE CIRCUITS REGARDING THE LEVEL OF IMMUNITY TO WHICH PAROLE OFFICERS ARE ENTITLED.

The Court of Appeals in the instant case held that the parole officers were entitled to absolute immunity, as well as the parole officials and parole board members. This conclusion is directly contrary to the case of *Wolfel v. Sanborn*, 691 F.2d 270 (6th Cir. 1982), where the Sixth Circuit held that a parole officer responsible for delaying a *Morrissey v. Brewer* or preliminary parole hearing was only entitled to qualified immunity.

Additionally, several other courts of appeals have ruled that parole officers are not entitled to absolute immunity, but rather are only entitled to qualified immunity. *Wilson v. Rackmill*, 878 F.2d 772, 775-776 (3rd Cir. 1989); *Farrish v. Mississippi State Parole Board*, 836 F.2d 969, 976-978 (5th Cir. 1988); *Harper v. Jeffries*, 808 F.2d 281, 284-285 (3rd Cir. 1986); *Nelson v. Balazic*, 802 F.2d 1077 (8th Cir. 1986); *Galvan v. Garmon*, 710 F.2d 214 (5th Cir. 1983).

The parole officers in the instant case performed administrative duties. They did not adjudicate petitioner's rights. This Court should grant review in this case and establish the level of immunity to which parole officers are entitled.

III.

THE COUNTY JAIL RESPONDENTS VIOLATED PETITIONER'S DUE PROCESS RIGHTS WHEN THEY RETURNED HIM TO JAIL AFTER HIS ACQUITTAL.

The Court of Appeals also ruled that the County Jail respondents did not violate petitioner's due process rights when they returned him to jail following his acquittal on the burglary charge. The rationale for this decision was that the jailers could rely upon what appeared to be a facially valid parole violation warrant, even though the sole basis for the issuance of that warrant, the burglary charge, was eliminated when petitioner was acquitted of that charge.

The leading case on which the Court of Appeals relied is *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689 (1979). What the Court of Appeals failed to discern from *Baker* is that the case involved *pre-trial detention*, not post-trial detention. The plaintiff in *Baker* was incarcerated pursuant to an arrest warrant that turned out to be the result of a mistake in identity. Plaintiff protested to the jail officials that he was wrongfully incarcerated, but his protest went unheeded. The plaintiff in *Baker* did not attack the validity of the arrest warrant but rather argued that he was deprived of his liberty for a period of days during which his protest went unheeded. Contrary to the reasoning of the Court of Appeals, this Court did not rule that anyone incarcerated pursuant to a "facially valid warrant' has no constitutional claim whatsoever. Rather, this Court observed in the *Baker* case:

> "*Obviously, one in respondent's position could not be detained indefinitely* in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment." 99 S. Ct. at 2694 (emphasis added).

Indeed, this Court emphasized the narrowness of its ruling and the applicability of that ruling to the pre-trial detention context when it further stated:

> "We may even assume, *arguendo*, that, depending on what procedures the State affords defendants detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty . . . without due process of law.' But we are quite certain that a detention of three days over a New Year's weekend does not and could not amount to such a deprivation." 99 S. Ct. at 2694-2695 (emphasis added).

This Court in *Baker* said nothing that supports the Court of Appeals' extension of *Baker* to the post-trial context, and actually implied the contrary when it held:

> ". . . we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent. Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error-free investigation of such a claim. *The ultimate determination of such claims of innocence is placed in the hands of the judge and the jury.*" 99 S. Ct. at 2695 (emphasis added).

It is obvious from the *Baker* opinion that the presence of such an "ultimate determination" such as occurred in this case totally alters the constitutional analysis. This Court, in *Baker*, said that the sheriff should not be placed in a position of determining whether or not someone arrested was guilty or innocent. Accordingly, this Court placed the responsibility ". . . in the hands of the judge and the jury." But where, as here, such an ultimate determination has been made, by a judge in a bench trial, the jail

administrators cannot and should not be able to close their eyes and say that they have no duty to ascertain the status of such an acquitted individual who remains incarcerated in their custody. It is one thing for a sheriff or jail administrator to argue that he is not the judge and jury, but it is quite another thing for a sheriff or jail administrator to argue that he has no duty to do anything but incarcerate somebody after the judge and the jury have ultimately determined that there is no basis for incarceration. If, as this Court stated in *Baker*, continued incarceration in the face of protests of innocence may rise to a constitutional violation, even given a "facially valid warrant," then it should necessarily follow that the continued incarceration of the petitioner after an actual determination of his innocence, in the face of a parole violation warrant that was solely and only based on the charge culminating in that determination of innocence, should violate the Due Process Clause of the Fourteenth Amendment to the Constitution.

CONCLUSION

For each and all of the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 88-1147

ANTHONY WAYNE THOMPSON,

Plaintiff-Appellant,

v.

CHERYL L. DUKE, CHESTER J. PUCCI, FLOYD COX, ROBERT GUTHRIE, RITA ALLEN, HAROLD THOMAS, MICHAEL LANE, PAUL J. KLINCAR, PHILIP T. HARDIMAN, ROY PATRICK, DR. WILLIAM POWELL, and THE COUNTY OF COOK,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 5082—**John F. Grady**, *Chief Judge.*

ARGUED SEPTEMBER 30, 1988—DECIDED AUGUST 14, 1989

Before CUMMINGS, FLAUM, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* While incarcerated and awaiting his parole violation hearing, Anthony Wayne Thompson was severely beaten by another inmate. Thompson brought a section 1983 action against various state defendants, alleging that their failure to schedule and conduct a timely parole violation hearing constituted a deprivation of his constitutionally protected liberty interests. He

also sued various county defendants, alleging that their failure to instruct and train their subordinates to investigate independently the status of his case constituted a deliberate indifference to his constitutionally protected interests. The district court granted summary judgment in favor of all of the defendants-appellees. We affirm.

I. BACKGROUND

On July 29, 1982, Anthony Wayne Thompson, a parolee, was arrested for burglary and incarcerated in the Cook County Jail. The next day, a court set his bond at $50,000.00 and scheduled his preliminary hearing for August 12, 1982. On that same day, Thompson's parole officer, Cheryl L. Duke, and her supervisor, Chester Pucci, issued a "parole violation warrant" based upon the burglary charge.[1]

On August 12, 1982, Thompson and his counsel appeared at the preliminary hearing on the burglary charge. Counsel called no witnesses and presented no evidence upon Thompson's behalf. The court ultimately determined that probable cause existed to believe that he had committed the offense charged and scheduled a trial for September 20, 1982. Thereafter, Duke, Pucci, and Robert Guthrie, an Illinois Department of Corrections hearing officer, scheduled Thompson's parole violation hearing for September 21, 1982, the day following the trial.

After the September 20 trial, the court acquitted Thompson of burglary. He was returned to the Cook County Jail to await his scheduled parole violation hearing. For unknown reasons, Duke, Pucci, and Guthrie did not conduct a parole revocation hearing the next day as planned. Thompson remained in the general prison population and three days later, on the evening of September 24, another inmate of the jail severely beat Thompson. He was hos-

[1] Thompson purportedly did not attempt to make bail on the burglary charge because of the pending parole violation warrant.

pitalized where his unfortunate situation was compounded by a series of less than desirable medical consequences.[2]

After he was released from the hospital, he was returned to Cook County Jail, at which time parole officials conducted a parole revocation hearing. The state found that Thompson had not violated any condition of his parole and he was released. Apparently, the officials did not realize that the parole violation warrant in fact had been formally withdrawn the day before the hearing.

Thompson brought a section 1983 action against various state and county defendants. He alleged that the state defendants-appellees, Duke, Pucci, and Guthrie, had violated his due process rights because they did not proceed with, or insure that others would proceed with, a preliminary parole or release violation hearing prior to September 24, 1982, the date Thompson was injured. He made this same charge against the state defendants-appellees, Rita Allen, an Interstate Compact Administrator, Harold Thomas, Guthrie's supervisor, and Floyd Cox, the Illinois Department of Corrections' "relief hearing officer" whom Thomas normally assigned to conduct hearings when Guthrie was unavailable.

Finally, Thompson alleged that the state defendants-appellees, Paul J. Klincar, Chairman of the Prisoner Review Board, and Michael Lane, Director of the Illinois Department of Corrections, likewise had violated his fourteenth amendment due process rights by failing to insure his release from detention following his acquittal upon the burglary charge. As to each state defendant-appellee,

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[2] According to Thompson, he was handcuffed and shackled while he awaited treatment in the hospital. His pain was discounted by physicians. Further, when surgeons attempted to treat his head fractures a few days later, they "broke a drill bit off in his head," a fact which he alleges that they attempted to conceal, and simultaneously spread an already serious infection, now chronic, throughout his body. Thompson's suit included claims against the persons who were responsible for the allegedly deficient medical care. Those claims are not involved in this appeal.

Thompson charged that he or she in some way was responsible for the timely holding of the constitutionally required hearing and that his or her deliberate indifference to the absence of such hearing constituted a deprivation of his constitutionally protected liberty interest.

Thompson also alleged that the county defendants-appellees, Phillip Hardiman, Executive Director of the Cook County Department of Corrections, and Roy Patrick, Superintendent of the Cook County Jail, deprived Thompson of his liberty without due process by:

> (1) promulgating or maintaining a policy whereby parolees are incarcerated without first making an independent determination of the validity of the incarceration; (2) incarcerating parolees with the general prison population; (3) denying parolees their right to counsel; and (4) failing to train, instruct and supervise subordinate officers as to the status and rights of parolees.

Thompson also contended that Hardiman and Patrick were directly responsible for parolees' custody and care, and that they should have released Thompson themselves or, at a minimum, inquired into his status following his acquittal, as well as investigate the state's subsequent failure to hold a preliminary parole hearing. He argued that their "blind following" of the facially valid parole violation warrant constituted deliberate indifference to his constitutionally protected liberty interest.

Thompson also alleged that the County of Cook promulgated and maintained a policy and practice "to blindly follow the State Board parole procedures" despite their unconstitutionality. He contended that the county's failure to implement independent policies and procedures to insure the protection of parolees violated his constitutional rights.

The district court granted summary judgment on the federal claims and dismissed Thompson's state law claims for want of federal jurisdiction. The district court ruled that, as a matter of law, the state defendants-appellees,

as members, officers and employees of the Illinois Prisoner Review Board, enjoyed absolute immunity in the performance of their quasi-judicial activities. The court also ruled that Hardiman and Patrick did not violate Thompson's rights because they relied upon, and were required to follow, the facially valid parole violation warrant. The district court further held that Thompson could not demonstrate that those defendants, or Cook County, had failed to promulgate policy and train their subordinates adequately to protect his rights or that their own activity was the direct cause of his injuries.

II. DISCUSSION

On appeal, Thompson contends that the Supreme Court's decision in *Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988), decided after the district court rendered its decision, undercuts the state defendants' ability to rely upon a claim of absolute immunity. Thompson also argues that the district court erroneously concluded as a matter of law that Hardiman, Patrick, and Cook County did not violate his due process rights.

A. *The State Defendants-Appellees' Absolute Immunity Claims*

As the district court correctly stated, absolute immunity serves to shield a defendant from suit altogether rather than merely acting as a defense to liability. *See Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985). Consequently, the district court focused solely, and correctly, upon the state defendants' absolute immunity claims first, noting that it would only reach the liability issue if it found that they did not enjoy immunity. Chief Judge Grady then determined as a matter of law that the state defendants were immune and dismissed the action because Thompson did not join his request for damages with a claim for declaratory or injunctive relief. *See, e.g., Pulliam v. Allen*, 466 U.S. 522, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984); *Scruggs v. Moellering*, 870 F.2d 376, 378 (7th Cir. 1989).

However, since the district court ruled upon the immunity issue, the United States Supreme Court issued its decision in *Forrester* in which the Court attempted to redefine the scope of the absolute immunity which judicial officers and persons performing quasi-judicial functions enjoy. The Court noted that "[d]ifficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts simply done by judges. Here, as in other contexts, immunity is justified by the *functions* it protects and serves, not the person to whom it attaches." 484 U.S. at ____, 108 S. Ct. at 544 (emphasis in original). With this distinction, the Court found that a judge's decision to demote and discharge a probation officer, as was his prerogative under Illinois law, was purely an "administrative decision," which "even though . . . may have been essential to the very functioning of the courts," could not be "regarded as [a] judicial act[ ]." *Id.* The Court ultimately held that such activity may not be shielded from review by a claim of absolute immunity.

Thompson does not contest that the state defendants generally enjoy absolute immunity because they in fact are persons who perform duties of an adjudicatory nature "functionally comparable" to the duties of a judicial officer. *See, e.g., Walker v. Prison Review Bd.*, 769 F.2d 396, 398 (7th Cir. 1985); *Trotter v. Klincar*, 748 F.2d 1177, 1180 (7th Cir. 1984) (involving among others state defendants-appellees Klincar and Guthrie); *United States ex rel. Powell v. Irving*, 684 F.2d 494, 497 (7th Cir. 1982); *cf. Stanley v. Indiana Civil Rights Comm'n*, 557 F. Supp. 330, 334 (N.D. Ind. 1983) (members of Indiana Civil Rights Commission enjoy absolute quasi-judicial immunity); *but see Fowler v. Cross*, 635 F.2d 476, 481 (5th Cir. 1981) (not addressing an absolute immunity claim, but stating that parole board members enjoy qualified immunity); *Thompson v. Burke*, 556 F.2d 231, 237-38 (3d Cir. 1977) (stating that parole board members are not judicial officers, and instead are executive officers who enjoy qualified immuni-

ty).[3] Instead, Thompson contends that their actions in this case, which ultimately gave rise to his section 1983 action, cannot be characterized as part of their "adjudicatory" functions. He argues that their conduct was purely "administrative" in nature and thus is not protected after *Forrester*.[4]

Specifically, Thompson argues that the state defendants had a duty to conduct, or at least to insure that he received, a timely preliminary parole revocation hearing. He argues that under Illinois law, Ill. Ann. Stat. ch. 38, ¶ 1003-3-9(c) (Smith-Hurd Supp. 1989), and the Supreme Court's holding in *Morrissey v. Brewer*, 408 U.S. 471, 483-84 (1972), the state defendants had no discretion to deny or postpone a preliminary parole revocation hearing. Consequently, their duty to schedule and hold such a hearing in a timely manner is a purely "administrative function" and thus they cannot claim absolute immunity. Without addressing whether Thompson states a valid section 1983 claim at all, we are convinced that *Forrester* may not be read so broadly.

Forrester clearly was an attempt to stress that courts should recognize a difference between purely administrative activities and those which are a part of the judicial

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[3] We, like the district court, do not think that a significant distinction exists between the duties performed by those defendants who are members of the Department of Corrections and those defendants who are members of the Prison Review Board. A defendant's function, not the title which he holds, determines the scope of his immunity claim. This proposition is especially true after *Forrester*. *See* 108 S. Ct. at 544. Thus, because all of the defendants played a very similar role in this case, their claims of absolute immunity will either stand or fall as a group. *Trotter*, 748 F.2d at 1182 n.5.

[4] In *Morrisey*, the Supreme Court established certain procedures which must be observed for revocation of parole. The Court did not consider any claims of immunity, either absolute or qualified. We thus cannot import any particular significance to the Court's use of the word "administrative." Instead, we must focus upon the judicial nature of the final decision, as we discuss below in connection with *Trotter*.

process. However, with this distinction made, the activity which Thompson challenges as "administrative" cannot in fact be so characterized.

In *Trotter*, a case decided before *Forrester*, we addressed a plaintiff-parolee's section 1983 claim against various officers, members, and employees of the Illinois Department of Corrections and Illinois Prisoner Review Board, including state defendants-appellees Klincar and Guthrie. There, the plaintiff relied upon *Morrissey* and alleged *inter alia*, that he "had been improperly denied a prompt preliminary hearing" because the defendants had failed to schedule and conduct a timely hearing. 748 F.2d at 1180. When confronted with the defendants' claims of absolute immunity, the plaintiff argued that the doctrine "reaches only the adjudicatory functions" of the defendants and "that the actions he complain[ed] of relate[d] solely to the administrative or ministerial functions of [the defendants]." *Id.* at 1182.

We agree that this court had "extended absolute immunity to parole boards for their adjudicatory functions only," *id.*, a proposition which we later rejected in *Walker*, 769 F.2d at 398-99. Nevertheless, we recognized the distinction then,[5] and rejected the plaintiff's attempts to characterize the challenged activity as "administrative," stating:

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[5] In *Walker*, decided after *Trotter*, we stated that "[t]his circuit ha[d] declined to accept a distinction between adjudicatory actions by Board members . . . and administrative actions," and cited *Trotter* for this proposition. 769 F.2d at 398. However, we did not discuss the plain language in *Trotter*, quoted above, which acknowledged that we in fact recognized a distinction between adjudicatory and administrative activity, but declined to characterize the challenged conduct as administrative rather than adjudicatory. *Trotter*, 748 F.2d at 1182. Thus, our decision to no longer recognize the distinction has little, if any, effect upon our statements in *Trotter* because they were made at a time when we clearly recognized the distinction which *Forrester* now makes explicit. The validity of our discussion in *Trotter* is further supported by our recent decision in *Scruggs*, which we discuss at length below.

> [W]e cannot agree that the actions that are the subject of this dispute are administrative or ministerial. . . . As the Supreme Court recognized in *Butz v. Economou*, 438 U.S. 478, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978), the grant of absolute immunity does not depend on the formal description of the official's activities, but rather on the nature of those activities. *Id.* 438 U.S. at 511-12, 98 S. Ct. at 2913. In light of *Butz*, we must consider whether the functions upon which the state officials would base their claim for immunity are "functionally comparable" to the activities of the judiciary. *See id.* at 513, 98 S. Ct. at 2914. *These functions include not only the actual decision to revoke parole, but also the activities that are part and parcel of the decision process. See Anderson* [*v. Boyd*, 714 F.2d 906 (9th Cir. 1983)]. *All the actions contested here are inexorably connected with the execution of parole revocation procedures and are analogous to judicial action relating to the conduct of trial proceedings and to ruling on motions of counsel.*

Trotter, 748 F.2d at 1182 (emphasis added).

Forrester does not vitiate our holding in *Trotter* as our recent decision in *Scruggs* illustrates. In *Scruggs*, we addressed a plaintiff's charge that a state judge and court reporter falsified the transcript of his criminal trial to prevent him from prosecuting a successful appeal of his conviction. 870 F.2d at 377. We upheld the district court's dismissal of the plaintiff's suit against the state judge and the court reporter on absolute immunity grounds.

Citing *Forrester*, we reaffirmed the fundamental principle that "[a] judge has absolute immunity from damages liability for acts performed in his judicial capacity . . . ." *Id.* The state judge in *Scruggs* had a duty under Indiana procedural rules to see to the correct preparation of the trial transcript. Such activity was judicial in nature because it concerned a judicial function. Acts carried out in a judicial capacity, whether based on statute, rule or in-

herent authority, are absolutely protected from damages liability.

In the continuum of judicial proceedings some judicial acts require extensive exercise of a judge's decision-making skills and others do not—yet all such acts make up the judicial function regardless of their isolated importance. In the judicial context, scheduling a case for hearing is part of the routine procedure in any litigated matter. However, the fact that the activity is routine or requires no adjudicatory skill renders that activity no less a judicial function.

Here, as in *Trotter*, the state defendants clearly had a duty to schedule and conduct a parole violation hearing. Such activity, while perhaps routine in many cases, is obviously an integral judicial (or quasi-judicial) function subject to absolute immunity.

Indeed, if we were to adopt Thompson's interpretation of *Forrester*, we would effectively subject judicial officers, as well as persons performing quasi-judicial functions, to unlimited litigation testing whether particular judicial functions, alleged to be mechanical or routine, were entitled to immunity from damages liability. We need not search far for a closely analogous example. If scheduling a hearing is not a part of an adjudicatory or judicial function, then an action could be maintained against a judge for injuries to an incarcerated defendant resulting from the judge's alleged failure to schedule a hearing or trial within an applicable speedy trial limitations period, or the judge's alleged failure to conduct a hearing or trial on the date scheduled. By the same token, if the judge purportedly failed to properly execute his duty to advise a criminal defendant of certain constitutional and statutory rights, yet accepted a guilty plea and incarcerated the defendant, under Thompson's rationale an action could be maintained against the judge for damages liability if the defendant is injured while in custody awaiting the outcome of his challenge to the court's methodology.

Such situations are foreclosed by *Forrester*, which confirmed absolute immunity from damages for all acts carried out as a part of the judicial function. Absolute judicial immunity was removed only for that narrow range of purely administrative acts, such as employment decisions, which are unrelated to the judicial function.

The policy reasons for affording absolute judicial immunity are set forth in *Forrester*. It is sufficient to say that judicial decision-making without absolute immunity would be driven by fear of litigation and personal monetary liability. Such opportunity for intimidation and retaliation constitutes a fundamental and unacceptable threat to an independent and impartial judiciary. The same rationale applies to those officers and agencies that perform quasi-judicial functions.

Thompson's contentions, to the extent that they are based upon the state defendants' duty to insure that other officials scheduled or conducted a timely parole revocation hearing, are likewise unmeritorious. We therefore affirm the district court's decision that the state defendants are absolutely immune from suit.

B. *The County Defendants Hardiman and Patrick*

The district court granted the county defendants', Hardiman and Patrick, motion for summary judgment on Thompson's section 1983 claim. Thompson offers three separate bases for his assertion that Hardiman and Patrick should be held liable for the alleged deprivation of his constitutional rights: (1) that Hardiman and Patrick had a duty to investigate his status as a parolee, (2) that Hardiman and Patrick, or their subordinates, knew that his rights had been, or were being, violated and that they failed to protect his interests, either by taking some action themselves or having in place a process by which their subordinates could take action, and (3) that even if Hardiman and Patrick had a duty to hold him under the "facially valid warrant," their duty to obey the state's mandate

disappeared once he was acquitted of the charge underlying the warrant. Again without making any determination whether Thompson in fact states a cognizable cause of action under section 1983, we must reject Thompson's contentions.[6]

In *Baker v. McCollan*, 443 U.S. 137, 145, 99 S. Ct. 2689, 2695, 61 L. Ed. 2d 433 (1979), the Supreme Court considered a plaintiff's section 1983 action for false imprisonment based upon a sheriff's negligent failure "to establish certain identification procedures which would have revealed that [he] was not the man wanted in connection with the drug charges on which he was arrested" pursuant to an otherwise valid arrest warrant. *Id.* at 139, 99 S. Ct.

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[6] It is unclear whether Thompson is challenging the county defendants' failure to insure that he received a timely preliminary parole violation hearing, a final revocation hearing, or both. In his briefs, Thompson initially contends, with respect to the state defendants, that he had a right to have an independent preliminary parole revocation hearing conducted, relying upon *Morrissey*, 408 U.S. at 485-87, 92 S. Ct. at 2602-03. However, we cannot determine whether he makes this same argument with respect to the county defendants.

He apparently concedes that a preliminary hearing on the offense underlying the parole violation warrant, at which time the trial court determines if probable cause exists to hold the defendant for trial, serves many, if not all, of the policies discussed in *Morrissey*. *See, e.g., Waller v. Drago*, 611 F. Supp. 405, 412 (D. Or. 1985). In fact, Illinois law now specifically provides that a preliminary hearing is unnecessary when "revocation is based upon new criminal charges and a court finds probable cause on the new charges . . . ." Ill. Ann. Stat. ch. 38, ¶ 1003-3-9(c) (Smith-Hurd Supp. 1989). As we recognized in *Trotter*, 748 F.2d at 1179 n.2, such a provision adequately serves the interests discussed in *Morrissey*.

In any event, Thompson appears to be concerned primarily with the county defendants' alleged failure to insure that the state defendants either held the September 21st hearing as scheduled, or released him immediately following his acquittal on September 20th. Therefore, we likewise will concentrate upon the alleged failure to hold a timely final parole revocation hearing.

at 2692. The Court held that someone executing an arrest warrant is not "required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent." *Id.* at 145-46, 99 S. Ct. at 2695. The Court further held, "Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error-free investigation of such a claim." *Id.* at 146, 99 S. Ct. at 2695.

On the basis of *McCollan*, Hardiman and Patrick, as mere jailers, only had a duty to determine the facial validity of the warrant under which Thompson was held; they had no independent duty to investigate Thompson's claims of innocence. *See also* Ill. Ann. Stat. ch. 125, ¶¶ 18, 203 (Smith-Hurd 1967 & Supp. 1989); *Fowler*, 635 F.2d at 480; *Zuranski v. Anderson*, 582 F. Supp. 101, 108-09 (N.D. Ind. 1984) (Indiana law); *accord People ex rel. Johnson v. Pate*, 47 Ill. 2d 172, 174, 265 N.E.2d 144, 146-47 (1970), *cert. denied*, 402 U.S. 976, 91 S. Ct. 1679, 29 L. Ed. 2d 141 (1971).[7] Furthermore, the facial validity of the warrant was not undercut by Thompson's acquittal on the burglary charge.

Illinois law specifically mandates that state officials and agencies should monitor the status of parolees, investigate parole violation charges, and conduct parole revocation hearings, not the jailers. Ill. Ann. Stat. ch. 38, ¶¶ 1003-3-1, 1003-3-2, 1003-3-7, 1003-3-9(3)(B)(iv)(c) (Smith-Hurd Supp. 1989); Ill. Ann. Stat. ch. 125, ¶ 203 (Smith-Hurd 1967 & Supp. 1989); *accord People v. Gillespie*, 45

[7] Thompson attempts to argue that *McCollan* does not apply because it dealt with a jailer's "pretrial" detention of an "innocent" person, rather than post-trial detention in which the person has in fact been acquitted. Because, as we discuss below, the state had a right to conduct a parole revocation hearing even following his acquittal on the underlying charge, Thompson was not an "innocent" person being detained; his "innocence" on the parole violation charge had not been determined. Thus, *McCollan* clearly applies.

Ill. App. 3d 686, 360 N.E.2d 133, 4 Ill. Dec. 386 (1977). Thus, Hardiman and Patrick cannot be faulted for failing to investigate an inmate's protestation of a procedural irregularity completely beyond the scope of the jail administration's responsibilities. As a practical matter, Hardiman and Patrick had no way of knowing whether the state defendants had some legitimate reason to hold a parole hearing even after his acquittal.

For example, at oral argument, counsel for Thompson stated that the standard by which a parole revocation is judged is a preponderance of the evidence. This statement in fact may overstate the standard by which parole is revoked. For example, many courts have found that in parole revocation "all that is required is that the evidence and facts reasonably demonstrate that the person's conduct has been as good as required by the terms and conditions of the release . . . ." *See, e.g., Mack v. McCune*, 551 F.2d 251, 254 (10th Cir. 1977) (*per curiam*); *Robinson v. Benson*, 570 F.2d 920 (10th Cir. 1978). We agree with the just-quoted statement of law and note the then obvious: the evidence could easily support revocation of his parole even though it does not meet the more stringent "beyond a reasonable doubt standard" employed in determining guilt.[8]

We note that dismissal of the charges underlying a parole violation warrant has been found of no consequence in the state's determination of a parole violation. *See, e.g., Gholston v. Jones*, 848 F.2d 1156, 1160 (11th Cir. 1988); *Taylor V. United States Parole Comm'n*, 734 F.2d 1152, 1155 (6th Cir. 1984); *Robinson*, 570 F.2d at 923. Furthermore, courts have observed that an appellate court's decision to overturn a conviction which was related to the state's decision to revoke parole is of no consequence to

[8] As a further example, depending upon the record in an individual case, the evidence adduced during the formal trial might indicate that a parolee was carrying a weapon, a clear violation of a mandatory condition of every parolee's parole. *See* Ill. Ann. Stat. ch. 38, ¶ 1003-3-7(a)(2) (Smith-Hurd Supp. 1989).

that decision. *See, e.g., Taylor*, 734 F.2d at 1155. Finally, courts have noted that outright acquittal on the charges underlying the parole violation charge does not control the state's decision to revoke parole. *See, e.g., Steinberg v. Police Court of Albany, N.Y.*, 610 F.2d 449, 451-52 (6th Cir. 1979) (citing *Mack*, 551 F.2d at 254).

With these decisions to guide us, we find no merit in Thompson's contentions. Thompson cannot question the validity of the warrant because he cannot demonstrate that "as a matter of law the acquittal of the state charges removed *all* factual support from the parole revocation . . . ." *Mack*, 551 F.2d at 254 (emphasis in original); *see also Robinson*, 570 F.2d at 923.

Based upon *McCollan*, Illinois statutory law, and Thompson's inability to attack the facial validity of the warrant, we hold that Thompson's arguments must fail. We therefore hold that the district court properly entered summary judgment in favor of Hardiman and Patrick.

C. *The County of Cook*

Thompson also appeals the district court's decision to grant Cook County's motion for summary judgment. The district court concluded that Cook County's "practice of simply following state law is not the promulgation or maintenance of a practice which directly causes injury." Thus, the court refused to impose section 1983 liability upon Cook County for its alleged violation of Thompson's constitutional rights.

In *Monell*, the Supreme Court held "that a municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue." *City of Canton v. Harris*, ____ U.S. ____, ____, 109 S. Ct. 1197, 1203, 103 L. Ed. 2d 412 (1989) (discussing *Monell*) (emphasis in original). The Court has noted that the issue is "whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." *Id.* Nevertheless, Thompson argues that Cook Coun-

ty is liable for its "failure to train" its employees—Hardiman, Patrick, and their subordinates—under the Supreme Court's recent decision in *City of Canton*. There, the Court held that a municipality may be found liable under section 1983 if the deprivation results from its "failure to train" its employees, but "only where the failure to train amounts to deliberate indifference to the rights of the persons with whom [its employees] come into contact." *Id.* at ____, 109 S. Ct. at 1204.

The problem with Thompson's "failure to train" argument, and his corresponding argument that the county promulgated a "policy" of "blindly following" the state's decisions, is that Cook County itself has no authority to train the employees involved or to set the policies under which they operate. The Cook County Jail, and the Cook County Department of Corrections, are solely under the supervision and control of the Sheriff of Cook County. *See* Ill. Ann. Stat. ch. 125, ¶¶ 202, 203 (Smith-Hurd 1967 & Supp. 1989). The Sheriff is an independently-elected constitutional officer who answers only to the electorate, not to the Cook County Board of Commissioners. Ill. Const. Art. VII, § 4(c); *see also Baltz v. County of Will*, 609 F. Supp. 992, 995 (N.D. Ill. 1985); *Thomas v. Talesky*, 554 F. Supp. 1377, 1378-79 (N.D. Ill. 1983). Consequently, Thompson cannot maintain a section 1983 action against Cook County for "practices, policies, or actions" which are unrelated to that entity. We therefore affirm the district court's grant of summary judgment in favor of Cook County under *Monell*.

III. CONCLUSION

We hold that the district court correctly found that the state defendants were absolutely immune from suit in light of the quasi-judicial nature of their activities. We also hold that the district court correctly entered summary judgment in favor of the county defendants, Hardiman and Patrick, and Cook County. Thompson cannot demonstrate that any entity other than the state had the responsibility for conducting the allegedly untimely parole revocation hearing.

The district court's decision is in all respects AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 14, 1989.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. MICHAEL A. KANNE, *Circuit Judge*

ANTHONY WAYNE THOMPSON,
Plaintiff-Appellant,

No. 88-1147 vs.

CHERYL L. DUKE, CHESTER J. PUCCI,
FLOYD COX, ROBERT GUTHRIE, RITA ALLEN,
HAROLD THOMAS, MICHAEL LANE, PAUL J. KLINCAR,
PHILIP T. HARDIMAN, ROY PATRICK,
DR. WILLIAM POWELL, and THE COUNTY OF COOK,
Defendants-Appellees.

Appeal from the No. Dist. of IL., East. Div.,
No. 84 C 5082
John F. Grady, Chief Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

[Dated December 29, 1987]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTHONY WAYNE THOMPSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 84 C 5082
	)	
CHERYL L. DUKE, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This is a civil rights action brought pursuant to 42 U.S.C. § 1983 for various alleged constitutional violations arising out of the incarceration and hospitalization of plaintiff Anthony Wayne Thompson ("Thompson"). Currently before the court are motions by the defendants for summary judgment under Federal Rule of Civil Procedure 56. For the reasons below, the motions are granted.

FACTS

The following facts are undisputed. Thompson had been on parole in Chicago beginning in March 1982, for a theft he committed in Indiana in 1981.[1] Complaint at ¶ 5. On

[1] Pursuant to the Interstate Parole and Probation Compact, Thompson was able to serve his parole in Illinois under a reciprocal parole agreement with Indiana. Ill. Rev. Stat. ch. 38, ¶ 1003-3-11 (1985).

July 29, 1982, he was arrested and charged with burglary. *Id.* at ¶ 6. The next day he was incarcerated at the Cook County Jail. *Id.* at ¶ 7. Thompson appeared with his attorney at a bond hearing on the same day; bond was set at $50,000 and a preliminary hearing was scheduled for August 21, 1982. State Defendants' Memorandum in Support of Motion for Summary Judgment at Exhibit A ("State Mem."). Plaintiff did not attempt to post bail because Cheryl Duke, his parole officer, and Chester Pucci, her supervisor, had already issued a "parole violation warrant" as a result of Thompson's arrest. Complaint at ¶ 10. *See also* Ill. Rev. Stat. ch. 38, ¶ 1003-14-2(c) (1985). There is no right to bail on a parole warrant, or "hold" as it is commonly known. *See People ex Rel. Johnson v. Pate*, 42 Ill. 2d 172, 265 N.E.2d 144, 146 (1970), *cert. denied*, 402 U.S. 976 (1971). The basis for the warrant was the arrest for burglary. Plaintiff's Memorandum in Opposition to State at Exhibit A ("Pl. Mem. in Opp. to State"). Thompson's preliminary hearing was held on August 12, 1982, at which time he was represented by counsel. Complaint at ¶ 11. Counsel called no witnesses and presented no evidence on Thompson's behalf. *Id.* The court found probable cause to believe Thompson had committed the burglary and scheduled a trial for September 20, 1982. *Id.* Defendants Duke, Pucci, and Robert Guthrie, a hearing officer, scheduled Thompson's preliminary parole violation hearing for September 21, 1982. *Id.* at ¶ 14.

Thompson's trial went forward on September 20 and the court found Thompson not guilty of the burglary charge. *Id.* at ¶ 15. Plaintiff was not released. Instead, he was incarcerated with the general prison population at the Cook County Jail. *Id.* at ¶ 16. For unspecified reasons, Duke, Pucci and Guthrie did not hold the parole violation hearing on September 21, 1982. *Id.* at ¶ 17. On the

evening of September 24 Thompson was severely beaten about the head and face by an inmate. *Id.* at ¶ 19. Plaintiff was taken to Cermak Health Services and then immediately transferred to Cook County Hospital. Plaintiff's Memorandum in Opposition to County, Deposition of Anthony Thompson at 86-87 ("Pl. Mem. in Opp. to County").

Precisely what occurred during plaintiff's hospitalization and subsequent surgery is in dispute. *See* Affidavit of Dr. Powell at ¶ 10. According to Thompson, he was handcuffed and shackled while he awaited treatment in the hospital. Pl. Mem. in Opp. to County, Dep. of Thompson at 90-91. His pain was discounted by his physicians. *Id.*, Dep. of Thompson at 95-96. On October 1, Drs. Alan Freint, James Oddie, and Powell, as the attending physician, performed surgery on plaintiff's head fractures. Complaint at ¶ 20. The surgery, rather than repairing his condition, exacerbated it by spreading an infection, now chronic, throughout his facial bones. Pl. Mem. in Opp. to County, Deposition of Richard Gardner at 10-17. During surgery, a drill bit broke off and lodged in Thompson's face, an occurrence that may render him blind in one eye. *Id.*, Dep. of Gardner at 28-29. On October 19, 1982, Thompson was released from Cook County Hospital and returned to the County Jail. Complaint at ¶ 21. Guthrie and Floyd Cox, another Illinois Department of Corrections hearing officer, held a preliminary parole violation hearing on the same date and found that no probable cause existed to indicate that Thompson violated the conditions of his parole. The parole warrant was therefore withdrawn. *Id.*

Thompson's Allegations

Thompson brought suit against defendants on June 15, 1984. The lengthy complaint names a panoply of state and

county officials who allegedly are responsible for depriving Thompson of his constitutional rights under color of state law. All state defendants are alleged to have violated Thompson's right to due process. He sues Paul Klincar, Chairman of the Prison Review Board of the Illinois Department of Corrections, and Michael Lane, Director/Chief Administrative Officer of the Illinois Department of Corrections, for promulgating policies which cause those parolees suspected of parole violations to be incarcerated without notification as to the reasons for their incarceration or prompt hearings. Complaint, Counts XIII and XIV at ¶ 56(a-b). Lane and Klincar also allegedly failed to supervise, train, and instruct Illinois Department of Corrections employees in their duties and in the rights and privileges of alleged parole violations. *Id.*, Counts XIII and XIV at ¶ 56(c-e).

Defendants Rita Allen, Administrator of the Interstate Correspondence Office of the Illinois Department of Corrections, and Harold Thomas, a superintendent of the Illinois Department of Corrections, are alleged to have knowingly failed to ensure that a prompt preliminary parole hearing was held, knowingly failed to investigate Thompson's status after September 20, and knowingly failed to arrange for the release of Thompson immediately upon the court's finding that he was not guilty of burglary. *Id.*, Count IX at ¶ 47 (a-d) and Count XI at ¶ 51(a-d).

The allegations against defendants Guthrie and Cox, both hearing officers employed by the Illinois Department of Corrections, and defendants Pucci and Duke, parole officers in the employ of the Illinois Department of Corrections, are the same as those against Allen and Thomas, except that Pucci is also alleged to have failed to supervise Duke. *Id.*, Count VII at ¶ 41(a-d); Count V at ¶ 36 (a-d); Count III at ¶ 31 (a-e); Count I at ¶ 25 (a-e). All state

defendants except Lane and Klincar are also alleged to have falsely imprisoned Thompson. *See id.*, Counts II, IV, VI, VIII, X and XII.

County defendants Phillip Hardiman, Executive Director of the Cook County Department of Corrections, and Roy Patrick, Superintendent of the Cook County Jail, are alleged to have deprived Thompson of his liberty without due process and his right to counsel by (1) promulgating or maintaining a policy whereby parolees are incarcerated without first making an independent determination of the validity of the incarceration; (2) incarcerating parolees with the general prison population; (3) denying parolees their right to counsel; and (4) failing to train, instruct and supervise subordinate officers as to the status and rights of parolees. *Id.*, Count XV at ¶ 27 (a-e). Defendants Freint, Powell and Oddie, physicians employed by Cook County Hospital, are said to have violated Thompson's eighth and fourteenth amendments rights by their inattention to his medical needs, by leaving him in restraints, and by failing to alleviate his pain. *Id.*, Count XVII at ¶ 25 (a-c). Defendants Rownie Brown and Elliot Roberts, medical directors of Cook County Hospital, allegedly violated plaintiff's eighth and fourteenth amendment rights by promulgating a policy that required patients received from the Cook County Jail to be restrained, by failing to train, instruct and supervise their subordinates in the rights of parolees, and operating Cook County Hospital in a way that prevented plaintiff from receiving immediate medical attention. *Id.*, Count XIX at ¶ 33 (a-c) and Count XX at ¶ 39(a-c). Defendant Cook County allegedly violated plaintiff's sixth, eighth, and fourteenth amendment rights by promulgating policies whereby: parolees are incarcerated without an independent determination of whether a basis for incarceration exists; parolees are denied their right

to counsel; parolees are required to be in restraints while being treated at Cook County Hospital; and Cook County Hospital cannot provide immediate medical treatment as required. *Id.*, Count XXI at ¶ 113(a-e). In addition, defendants Hardiman and Patrick are alleged to have falsely imprisoned Thompson (*id.*, Count XVI at ¶ 29), and defendants Freint, Oddie and Powell are alleged to have performed their duties to plaintiff in a negligent or wanton manner. *Id.*, Count XVIII at ¶ 27. Almost all defendants have filed motions for summary judgment, to which we now turn.[2]

DISCUSSION

State Defendants

Immunity

The state defendants argue that they are either absolutely or qualifiedly immune from suit. State Mem. at 12. Immunity serves to shield a defendant from suit rather than merely acting as a defense to liability. *Mitchell v. Forsythe*, 427 U.S. 511, 526 (1985). Therefore, we must consider the immunity argument first, without reaching any conclusions concerning the state defendants' liability. Whether or not defendants have immunity is a question of law for the court. *Whitt v. Smith*, No. 86-2882, Slip Op. at 5 (7th Cir. Nov. 2, 1987). If defendants are immune from suit, then plaintiff is without a federal remedy, as he has only requested monetary relief and does not

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[2] Drs. Frient and Oddie, two named defendants, have not joined in the motion for summary judgment.

Plaintiff has conceded that he cannot maintain an action against Rownie Brown. Elliot Roberts has never been served and is not before the court. *See infra* p. [28].

appear to have standing for declaratory or injunctive relief. *See Pulliam v. Allen*, 466 U.S. 522 (1984).

It is fairly settled in this circuit that the Illinois Prison Review Board, its officers and employees are absolutely immune from suit for their official acts. *Walker v. Prison Review Board*, 769 F.2d 396 (7th Cir. 1985); *Trotter v. Klincar*, 748 F.2d 1177 (7th Cir. 1984); *United States ex rel. Powell v. Irving*, 684 F.2d 494 (7th Cir. 1982).[3] Our inquiry, however, does not end there. In finding the Prison Review Board absolutely immune from suit, the Seventh Circuit employed the "functional comparability" test enunciated in *Butz v. Economou*, 438 U.S. 478, 512 (1978). The test requires a court to determine whether the "administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suit." *Id.* at 512-13. Applying that test, the Seventh Circuit held that Board members' actions which functionally compare to those of the judiciary "include not only the actual decision to revoke parole, but also the activities that are part and parcel of the decision process." *Trotter*, 748 F.2d at 1182. In *Walker*, the Seventh Circuit took an even more expansive view of the scope of immunity, stating that immunity "encompasses all actions taken by Board members in the course of their official duties whether or not they may be classified as adjudicatory or *administrative*." *Walker*, 769 F.2d at 399 (emphasis added).

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[3] Because it is the function an official performs and not the title he or she holds that determines entitlement to immunity, we think it of no importance whether the Department of Corrections or Prison Review Board is involved. All of the state defendants' actions related to their function of determining whether to revoke a parolee's parole. *See Trotter*, 748 F.2d at 1182 n.5.

There is little doubt that the acts, omissions and policies which are alleged to have caused plaintiff injury—the failure to release him upon acquittal and the failure to conduct a prompt preliminary parole hearing—were administrative actions taken by Board members in the course of their official duties. Defendants Klincar and Lane are the state officials responsible for promulgating the alleged unconstitutional policy of reincarcerating parolees acquitted of new sentence violations and denying them prompt parole violation hearings. Defendants Duke and Pucci both issued the parole hold warrant and eventually withdrew it. Defendants Guthrie and Cox were responsible for conducting a preliminary parole revocation hearing; defendants Thomas and Allen were responsible for ensuring that the hearing was held. All of these acts—the issuing of the warrant, plaintiff's reincarceration pursuant to the warrant, the scheduling (and delay) in holding the parole violation hearing—were part and parcel of the decision either to revoke plaintiff's parole or not. That these "acts" largely consist of omissions does not change the analysis.

Plaintiff urges that because the defendants' actions were mandatory and not discretionary, they should not be shielded with a doctrine developed to protect the integrity of judicial (or executive) decision making. Pl. Mem. in Opp. to State at 21-22. The Seventh Circuit, however, has chosen not to draw such a distinction and in *Walker* explicitly repudiated any attempt to do so. *Walker*, 769 F.2d at 399.

The conclusion we must reach is that the state defendants are absolutely immune from suit in this case. The only possible exception would be if the defendants' acts had been undertaken in the clear absence of all jurisdiction. *Stump v. Sparkman*, 435 U.S. 349 (1978). While the defendants clearly are empowered to conduct parole viola-

tion hearings, and therefore their dereliction in not conducting them promptly does not negate their immunity, it is not immediately apparent that defendants have "jurisdiction" to incarcerate parolees who have been acquitted of the charge that constitutes the basis of the suspected parole violation.

The Supreme Court in *Bradley v. Fisher*, 80 U.S. 335 (1871), which has seminal importance for the more recent Supreme Court precedent of *Stump v. Sparkman*, observed a distinction between acting in excess of jurisdiction and in the clear absence of all jurisdiction.

> Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority. . . . But where jurisdiction over the subject-matter is invested by the law in the judge . . . the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case . . . .

Bradley, 80 U.S. at 351. The Court gave examples of a judge acting in excess of his jurisdiction: a judge with general criminal jurisdiction who convicts a person of an act which is not criminal or who sentences a person to an unauthorized punishment. *Id.* For these acts, a judge is immune. *See also Berg v. Cwiklinski*, 416 F.2d 929 (7th Cir. 1969) (traffic court judge who imprisons defendant for contempt is absolutely immune); *Wiggins v. Hess*, 531 F.2d 920 (8th Cir. 1976) (judge who improperly ordered defendant arrested and committed for a crime which carried no prison term found absolutely immune). In contrast, situations where a judge acted in the clear absence of jurisdiction are factually dissimilar to the case before us and involve cavalier, *sua sponte* acts. *See Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir. 1980) (judge, who at mid-

night and on his own initiative, caused plaintiff to be arrested, tried, convicted (on a forged guilty plea) and incarcerated for 240 days is not immune); *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979) (judge who, motivated by racial prejudice, harassed plaintiff with criminal investigations and calls to media and city officials demanding he be fired from the police force, is not immune from suit). In the case before us, the state defendants acted at most in excess of their jurisdiction. Obviously, they have jurisdiction to issue and withdraw parole hold warrants and to hold parole hearings. However unfortunate their failure to act may have been, we cannot say their omission divests them of their immunity. Because we find the state defendants absolutely immune from suit, we do not reach the issue of qualified immunity. We grant summary judgment in favor of these defendants on the federal counts. *Whitt*, Slip Op. at 6. We must dismiss the state counts for lack of subject matter jurisdiction. *United Mine Workers v. Gibbs*, 338 U.S. 715 (1966).

County Defendants

As a preliminary matter, we note that plaintiff concedes that summary judgment should be granted with respect to Rownie Brown. Pl. Mem. in Opp. to County at 1. Additionally, Elliot Roberts has never been served, nor has he filed an answer or appearance. He therefore is not properly before the court. Finally, neither Drs. Frient nor Oddie have joined in the summary judgment motion.

The remaining county defendants—Hardiman, Patrick, Powell, and the County of Cook—argue in the main that they did not violate any of plaintiff's rights. As regards Hardiman and Patrick, plaintiff has alleged that they deprived him of liberty without due process by (1) promul-

gating or maintaining a policy whereby parolees are incarcerated without making an independent determination of the validity of the incarceration; (2) incarcerating parolees with the general prison population; (3) denying plaintiff's right to an attorney; and (4) failing to train, instruct and supervise subordinate officers as to the status and rights of parolees. None of these allegations, or the facts adduced in support of them, show that defendants are not entitled to summary judgment as a matter of law. The County of Cook, Hardiman, as Director of the Cook County Department of Corrections, and Patrick, as Superintendent of Cook County Jail, do not have a duty to ascertain the validity of anyone's incarceration. A jailer—which is all the county and its officials were in this case—is required only to determine the facial validity of a warrant; he has no duty to independently investigate claims of innocence. *Baker v. McCollan*, 443 U.S. 137, 145 (1979).

The law in Illinois is clear. The county defendants have a statutory duty to retain an individual in custody when a court of law or governmental agency issues a facially valid warrant. Ill. Rev. Stat. ch. 125, ¶ 203 (1985). *See also Fowler v. Cross*, 635 F.2d 476 (5th Cir. 1981) (summary judgment proper for county officials who had no statutory duty to monitor parolees, investigate parole charges, or hold hearings). The county defendants were under a legal duty to retain Thompson in custody. The state defendants had issued a parole violation warrant that was facially valid throughout Thompson's entire incarceration. The county had to detain Thompson until the warrant was withdrawn. *People ex rel. Johnson v. Pate*, 47 Ill. 2d 172, 174, 265 N.E.2d 144 (1970), *cert. denied* 402 U.S. 976 (1971).

Illinois law mandates that state officials and agencies, not the county, monitor the status of parolees, investigate

parole violation charges, and conduct parole revocation hearings. Ill. Rev. Stat. ch. 38, ¶¶ 1003-3-1, 1003-3-2, 1003-3-7, 1003-3-9(3)(B)(iv)(c); ch. 125, ¶ 203 (1985). The county officials have no authority to require the state to act. As a result, the county defendants can neither be charged with having violated plaintiff's rights by failing to immediately release him upon acquittal nor by failing to monitor his status, investigate the parole warrant, or conduct a prompt preliminary hearing. While Thompson states that Hardiman and Patrick did not "train their subordinates to handle inmate protests of wrongful incarceration," and maintained a general policy of "overlooking information" which would substantiate an inmate's protestations of his innocence, he sets forth no facts which suggest that the county defendants have a legal duty to do any of these things. The law makes the state accountable for parolees and the fact that the county defendants executed the state's policy does not, without more, open them up to § 1983 liability.

Plaintiff also alleges that defendant Cook County promulgated and maintained a policy and practice "to blindly follow the State Board parole procedures," despite their unconstitutionality. Pl. Mem. in Opp. to County at 5. However, the County of Cook would be liable only if *its* practices were the direct cause of plaintiff's injuries. *Monell v. Department of Social Services*, 436 U.S. 658, 690-91 (1984).[4] As should be evident from the foregoing discussion, the County of Cook's practice of simply following

[4] We note that contrary to plaintiff's contention, this construction of *Monell* does not constitutionalize the "Auschwitz defense." Pl. Mem. in Opp. to County at 15. In certain circumstances the explanation "I was just following orders" will not insulate a defendant from liability. But this is not one of those situations.

state law is not the promulgation or maintenance of a practice which directly causes injury. The authority on which plaintiff relies does not support his position that a municipality's practice of detaining a parolee on a facially valid warrant and/or idly allowing the state to be derelict in not holding prompt parole revocation hearings violates 42 U.S.C. § 1983. In *Powe v. City of Chicago*, 664 F.2d 639 (7th Cir. 1981), the warrants in question were issued by Cook County and the unconstitutional practices were promulgated by the county and the City of Chicago. *Id.* at 642-43. Here, the parole warrant issued pursuant to state law and through state officials; the alleged unconstitutional practices originate from the state. Plaintiff's citation to *Glares v. Perse*, 628 F.2d 679 (1st Cir. 1980) is mystifying, as the court affirmed the dismissal of the case for failure to state a § 1983 claim. *Heinback v. Village of Lyons*, 597 F.2d 344 (2d Cir. 1979) involved an attack on a municipality's practice of evicting low-income people from areas the city wished to redevelop and harassing, even arresting, opponents of the city's actions. The county defendants' actions in no way approach those in *Heinback*. Their activities either are mandated by state law or concern an area where the county has no power to act. In fact, that is plaintiff's very contention, that Cook County and its officials were just following orders. We cannot hold, on this set of facts, that following state law and practice is in and of itself a constitutional violation.

Thompson's claim that the county defendants violated his sixth amendment right to an attorney is wholly unfounded in the law, as plaintiff has no right to an attorney for a parole revocation hearing. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Inasmuch as plaintiff has not pursued this argument in his brief, we surmise he concedes the futility of this claim.

Failure to segregate plaintiff from other inmates could give rise to an eighth amendment violation if by that failure defendants acted with deliberate indifference to a known or pervasive risk of injury. *Davidson v. Cannon*, ____ U.S. ____, 106 S. Ct. 668, 670 (1986).[5] Plaintiff argues that as a parolee who had been acquitted of a crime, he should not have been placed in the same area as convicted criminals. Complaint, Counts XV, VI at ¶ 27(b). Plaintiff overlooks his own status as a convicted felon. But more to the point, defendants provide evidence by way of plaintiff's own deposition which shows that defendants did not know plaintiff would be subjected to any risk of injury and, therefore, did not act with deliberate indifference toward him. Thompson knew he would be attacked but he did not tell any guards (County Mem., Deposition of Thompson at 65-66, 84); he did not ask to be transferred to a different area of the jail or to be placed in protective custody (*id.*, Dep. of Thompson at 65); nor did Thompson use a readily available telephone to call family members, jail authorities, or his attorney and explain that he was in danger (*id.*). Thompson had many opportunities to inform prison officers of the threatened attack but did not. Plaintiff does not dispute any of this evidence. We find there is no genuine issue of material fact as to whether defendants were deliberately indifferent to plaintiff, since they "had no knowledge that plaintiff, as distinguished from the offender population at large, faced any special danger." *Massey v. Smith*, 555 F. Supp. 743, 749 (N.D. Ind. 1983).

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[5] Thompson had previously been convicted of a felony and would not have been incarcerated anew but for that prior conviction. Accordingly, we analyze his claim under the eighth amendment rather than the Due Process Clause which is appropriate for unconvicted pre-trial detainees. *See Bell v. Wolfish*, 441 U.S. 520 (1978).

Plaintiff's final allegations involve the medical care (or lack thereof) he received from the county and Dr. Powell. Plaintiff alleges that defendants violated his eighth and fourteenth amendment rights by their inattention to his medical needs and by promulgating and maintaining a policy that required patients received from Cook County Jail to be restrained. As to the latter allegation, defendant Powell presents an affidavit wherein he denies that any such policy exists. County Mem., Affidavit of Powell at ¶¶ 11-12. Plaintiff, by way of deposition, states that he was at all times chained to his bed. Pl. Mem. in Opp. to County, Deposition of Thompson at 90-91, 95-96, 105-107. Had defendants simply moved to dismiss this allegation, the fact that Thompson bases the existence of a municipal practice on his experience alone would not necessarily be fatal to his claim. *Strauss v. City of Chicago*, 760 F.2d 765, 769 (7th Cir. 1985); *Boyd v. Village of Wheeling*, No. 83 C 4768, Memorandum Op. at 26-28 (N.D. Ill. Sept. 12, 1985) (Grady, J.). However, this is a motion for summary judgment and defendants have submitted evidence that no such policy exists. Because plaintiff has not submitted *any* evidence of repeated acts or a pattern of conduct, we conclude that there is no genuine factual issue as to the existence of a municipal policy from his singular experience and this claim must fall.

As for the claims of medical neglect based on the eighth amendment, plaintiff does not even attempt to argue that defendants' acts or omissions constituted a "deliberate indifference" to his serious medical need, nor does the evidence establish a "deliberate indifference." After the attack, plaintiff was taken to Health Services where a doctor ordered that he immediately be taken to Cook County Hospital for treatment. He was immediately taken to the hospital and treatment began. While plaintiff contends, and not without apparent reason, that the treatment he

received was substandard, medical malpractice is not tantamount to deliberate indifference. *See Estelle v. Gamble*, 429 U.S. 97 (1976). Plaintiff does not contend that his serious medical needs were ignored or that he was denied access to adequate medical personnel. Therefore, § 1983 affords him no relief. Additionally, the claim that the County of Cook promulgates and maintains a policy whereby patients cannot receive adequate medical care likewise fails because plaintiff has provided no evidence of such a policy and defendants provide evidence by way of affidavit denying the existence of such a policy. County Mem., Affidavit of Rownie Brown at ¶¶ 5-6.

To conclude, we must grant summary judgment in favor of all county defendants. Their actions were not the direct cause of Thompson's injuries, nor has Thompson set forth facts which give rise to a genuine issue for trial concerning the existence of any county policy which caused his injuries. Thompson's allegations under the sixth and eighth amendments likewise fail as a matter of law.

We also dismiss all pendent state claims against the county defendants because we have no independent basis for jurisdiction over the dispute between these non-diverse parties. *United Mine Workers v. Gibbs*, 338 U.S. 715 (1966). This includes claims against Drs. Freint and Oddie, even though they are not parties to this motion. *Aldinger v. Howard*, 427 U.S. 1, 9 (1976).

CONCLUSION

The motions for summary judgment are granted.

DATED: DEC 29 1987

ENTER: /s/ JOHN F. GRADY

SUPREME COURT OF THE UNITED STATES

No. A-333

Anthony Wayne Thompson,

Petitioner

v.

Cheryl L. Duke, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including January 11, 1990.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 6th day of November, 1989.

THOMAS DEPOSITION
EXHIBIT 1

State of Illinois
Department of Corrections

MEMORANDUM

Date: March 10, 1981

To: Harold Thomas, Area I Superintendent
Community Supervision

From: Anthony M. Scillia, Deputy Director
Community Services Division

Subject: MORRISSY BREWER HEARING

It has come to my attention again that Morrissy Brewer hearings are not being conducted on several releasees who are returned to a correctional center.

I have been told in confidence that an attorney is ready to sue the Department on this issue.

I am directing you to immediately solve this problem once and for all.

/s/ Anthony M. Scillia
Deputy Director
Community Services Division

AMS:cdh

cc: Michael P. Lane, Acting Director
James Irving, Chairman, Prisoner Review Board
Mark Widmer, Manager, Community Resources

THOMAS DEPOSITION
EXHIBIT 2

State of Illinois
Department of Corrections ADULT DIVISION

MEMORANDUM

Date: April 1, 1981

To: Anthony M. Scillia, Deputy Director
Community Services Division

From: Harold Thomas, Superintendent
Area I Community Supervision

Subject: Morrissy Brewer Hearings

Please be advised that I am addressing the problem of releasees being returned without Morrissy Brewer Hearings by broaching several issues.

Supervisors are being requested to assign the completion of violation reports as a top priority so that the hearing may be conducted at Cook County Jail before being shipped. (See attached memo).

I have met with Chairman Irving on several occasions to discuss this problem. As you are aware, Chairman Irving is proposing legislation that would require local county jails to detain releasees until they have had a hearing.

As you know, Mr. Golsher, the Prisoner Review Board representative here in Chicago, conducts these hearings at Cook County Jail every Friday, in conjunction with Assistant State's Attorney Joseph Nigro. If we are able to ensure timely completion of the violation reports, and assistance from Cook County Jail in not shipping technical violators until they receive a hearing, this problem will be eliminated.

/s/ Harold Thomas, Superintendent
Area I Community Supervision

PUCCI DEPOSITION EXHIBIT 2

State of Illinois
Department of Corrections
Adult Community Supervision

Operational Standards and Procedures

Effective Date: 4/1/81

Subject: Preliminary Parole/Mandatory Supervised Release Violation Hearing

I. POLICY OF DEPARTMENT: To afford the alleged parole/release violator his/her rights (U.S. Supreme Court Decision, No. 715103, Morrissey vs. Brewer) to hear the charges against him and evidence to support the alleged violation, to ask questions and to present evidence and documents in his own behalf; to determine whether or not there is probable cause that the parolee/releasee could have violated the terms of his/her parole/MSR Agreement.

II. EXPLANATION:

A. As a Hearing Officer, you are representing the Prisoner Review Board; and as a representative of such, your conduct and appearance should reflect that role. While it should be emphasized that the proceedings are informal in time, it is important that you strive to be impartial and conduct a fair Hearing, as the Hearing is of a serious nature.

1. The general outline for the Hearing will be as follows:

a. Identify yourself giving your name and position

b. Identify the parolee/releasee (Example: John Smith, MC 1000)

c. Read the complete Notice of Charges to the parolee/releasee from top to bottom

2. The Hearing Officer shall explain that this is an Administrative Hearing - not a *Revocation Hearing* and is not bound by the same rules of evidence or the rules of law as in Court Trials. The Hearing is conducted for the following reasons:

   a. To establish whether or not there is *probable cause* parolee/releasee *could have* violated the terms of his parole/release agreement.

      The Hearing Officer *cannot hear evidence of circumstances in mitigation.* Such considerations are only heard by the Prisoner Review Board.

   b. To review evidence that will support the finding (level of probable cause).

   c. To determine if there is a reasonable cause to believe that parolee/releasee has violated conditions of his or her parole/release.

3. The Hearing Officer will inquire into the status of any pending criminal charges. What charges, if any, are pending in criminal preliminary hearing - if probable cause has been found in Courts, advise the subject that normally this would constitute probable cause for the Preliminary Parole Release Violation, the Hearing would only be necessary for technical violation(s).

4. The Hearing Officer will inform the subject of his right to waive Hearing, and what a waiver constitutes. No admission of guilt; it merely shows that the subject wishes to proceed to the revocation hearing bypassing the preliminary hearing.

B. In the course of the Hearing, each charge will be heard separately (unless stemming from the same incident). The following will be done as required:

1. Evidence presented consisting of documents and/or witnesses related to the alleged violation(s), at the discretion of the Hearing Officer.

2. The Hearing Officer will administer oaths to all giving testimony in the Hearing. (see appendix 32)

3. Parolee/releasee or counsel shall have the opportunity to examine documents presented, excluding violation report material where subjective evaluations offered by the Parole Agent might jeopardize or compromise his ability to continue working with the releasee, and question the Parole Agent as well as other witnesses present.

4. Parolee/releasee has the right to present letters or documents, or have witnesses testify in his behalf. The Hearing Officer determines whether such testimony is relevant to the alleged violations. Should the parolee/releasee have pending charges, he may elect to remain silent, as any statements could be used against him in court - if the parolee/releasee should elect to remain silent, it shall not be held against him.

5. Hearing Officer may question both the Parole Agent and parolee/releasee as well as any witnesses. Hearing Officer determines the order witnesses appear, as well as controlling who shall be present or excluded from the Hearing Room.

C. At the conclusion of the Hearing, the parolee/releasee will be informed of the decision on each allegation, and a brief basis for such decision. In

the case of no probable cause, no rationale need be given.

1. Probable Cause - if probable cause is found the procedures of the revocation process will proceed. (Deliver a copy of the proceeding within two (2) days of the parolee).
2. No Probable Cause - if no probable cause is found, the Field Service Representative should immediately notify the Parole Supervisor of this finding, and the Prisoner Review Board.
3. It is the responsibility of the Field Service representative to process the parolee/releasee for release as soon as possible after no probable cause is found.

D. The Hearing Officer will complete a "Preliminary Parole/Release Violation Hearing—Report of Finding" form in quadruplicate during the course of the violation hearing. This form, which includes the results of the hearing, summary of evidence, and any recommendations to the Board, will be forwarded to the Field Service Representative at the institution where the violation hearing is being conducted. It will be the responsibility of the Field Service Representative to ensure that all copies of this form are signed, dated, and distributed to the following:

1. Prisoner Review Board
2. Parent institution (Field Service Office)
3. Parolee/releasee
4. Parole Office

EXTERNAL AUDIT

An external audit will be conducted at least annually by Community Services Division staff to ensure compliance with policy and procedure and the results shared with the Chief Administrative Officer.

* * * * *

THOMAS DEPOSITION
EXHIBIT 3

State of Illinois

PRISONER REVIEW BOARD

James R. Irving, Chairman

DATE: April 13, 1981

TO: James R. Irving, Chairman
Prisoner Review Board

Anthony M. Scillia, Deputy Director
Community Services Division

FROM: Joseph J. Longo, Member

RE: Preliminary Hearings at
the Cook County Jail

As a follow-up to my March 30, 1981 memo concerning locally conducted preliminary hearings, a second meeting was held at the Cook County Jail, Division 5 on April 13, 1981. This meeting was held with Cook County Director of Corrections Phillip Hardiman. Also representing the County was Lieutenant Curtis, Supervisor of jail record-keeping and Jim Bongovanni, Computer Supervisor. Representing the State was Mike Kraft, Dan Zorich, Herbert Goldsher, and Tom Wells, Prisoner Review Board (Mr. Wells arranged the meeting) and myself.

Director Hardiman was quite receptive to the idea and concept of assigning an Illinois Department of Corrections Field Staff person to the Cook County Jail in an effort to routinely identify Illinois parolees held in custody and to expedite arrangements for the conducting of a preliminary hearing before shipment. Director Hardiman further indicated that the assignment of a Department of Corrections Staff person may help other areas of concern

between the State and County levels and in the long run, help improve the overall working relationship.

The identification process will require, as I indicated previously, the inter-facing of State and County record-keeping systems. It was further agreed that the assignment of the DOC person could, and should take place immediately. Mike Kraft was designated along with Lieutenant Curtis to implement and work out the details for such an assignment.

As I indicated to Mr. Scillia in a telephone conversation on this date, in order for this system or any system to prove workable, it will require divisional commitment and enforcement of the procedure as adopted.

As Mike Kraft develops the implementation of this plan, he will work closely with Herbert Goldsher and Dan Zorich who participated in the planning stages of this idea.

JJL:kh

cc: Michael P. Lane, Acting Director, Department of Corrections
Harold Thomas, Superintendent of Community Supervision
Mike Kraft, Executive Assistant, Department of Corrections
Herbert Goldsher, Prisoner Review Board
Dan Zorich, Department of Corrections
Tommy L. Wells, Prisoner Review Board

PLAINTIFF'S EXHIBIT A

ADULT PAROLE SERVICES

July 30, 1982

WARRANT DISPOSITION

To: Chester J. Pucci, Warrant Officer
From: Cheryl Duke, CPC.11, Lakeview Office # 119
Subject: Anthony Thompson

No. Indiana 21709Y
Il. X 50761

Warrant Request: Issuance
Date Paroled 2-23-82
Violation Date 7-19-82
Max Date 2-23-82

Comments:

Subject was arrested by Officers of the Chicago Police Department and charge with the crime of Burglary. Subject was arrested on 7-29-82.

* * * * *

Disposition:

IS 7-30-82
WS 7-30-72

WARRANT ISSUED ON
7-30-82 #NS 823198

/s/ Chester J. Pucci, Supervisor

cc: [omitted in printing.]

PUCCI DEPOSITION EXHIBIT 6

ADULT PAROLE SERVICES

NOTICE OF CHARGES

AUGUST 12, 1982

ANTHONY THOMPSON DOC No. IND X-50761

You are hereby notified that you have been charged with the following alleged violations of the conditions of parole or mandatory supervised release:

That on 29 JULY 1982 you allegedly COMMITTED THE OFFENSE OF BURGLARY IN VIOLATION OF RULE #2 OF YOUR MSR AGREEMENT WHICH STATES, "YOU MUST OBEY ALL MUNICIPAL, COUNTY, STATE AND FEDERAL LAW AND ORDINANCES."

* * * * *

You are further notified that a preliminary hearing will be held before a Hearing Officer on 9-21-82.

* * * * *

Signature: Cheryl Duke

Title: CPC II

I HAVE RECEIVED A COPY OF THIS NOTICE OF CHARGES

Signature: Anthony Thompson Date: 9-13-82

I WISH TO WAIVE THE PRELIMINARY HEARING

Signature: _____ Date: _____

A copy of the foregoing was delivered to the alleged violator on 9-13-82.

Signature: Robert Guthrie

PUCCI DEPOSITION EXHIBIT 9

ADULT PAROLE SERVICES

DATE: October 19, 1982

WARRANT DISPOSITION

To: CHESTER J. PUCCI, WARRANT OFFICER, LAKEVIEW OFFICE

From: Michael McManus, PAROLE OFFICER #109

Subject: Anthony Thompson

No. X-50761 (Illinois)

Alias: _____ INST.: 21709Y (Indiana)

WARRANT REQUEST:

* * * * *

X Withdrawn (WI) 10-19-82

* * * * *

Disposition:

Subject was arrested 7-29-82 for Burglary. Parole Violation WARRANT # NS 823198 was lodged 7-30-82. On 9-20-82, Subject was found Not Guilty of Burglary in Cook County Criminal Court. On 10-19-82, Hearing Officer No Probable Cause. Per approval of Superintendent Harold Thomas, via telecommunication on 10-18-82, at 4:30 P.M., Warrant # NS 823198 is being withdrawn.

* * * * *

/s/ Chester J. Pucci, Supervisor

Current Location of Warrant:
Cook County Jail

cc: [omitted in printing.]

PRELIMINARY PAROLE OR RELEASE VIOLATION HEARING—REPORT OF FINDING

In the matter of Anthony Thompson
DOC No. X-50761

Releasee is accused of violating conditions of Release in the following regard (Specifically set forth in Notice of Charges).

1. Parole Agreement Rule 2 on 7/29/82

Written Notice of Charges having been served on parolee by: Robert Guthrie, at Cook County Jail 9-13-82.

On 10-19-82, the undersigned Floyd Cox CPC III having been duly appointed a Hearing Officer to conduct preliminary parole violation hearings did hear the above matter at Cook County Jail at the hour of 1:20 p.m. on October 19, 1982 and this Hearing Officer was not involved in the initial report of violations or recommended revocations.

After hearing is had, the undersigned does find there is not probable cause that the following conditions of parole have been violated and that the Prisoner Review Board shall not conduct a parole violation hearing on such alleged violations.

Parole Agreement Rule 2—Burglary Charges

The following is a list of the witnesses and documents presented at the hearings:

Anthony Thompson—Subject
Notice of Charges—Parole Violation Report—Warrant Disposition—Arrest Report

The following is a summary of the evidence presented and the basis of my findings:

Subject was found not guilty by Judge Suria on the charge of Burglary on September 20, 1982. Subject

stated that he was innocent of the charge. I find no probable cause on subject's charge and recommend the P.V. warrant be withdrawn.

/s/ Floyd Cox — 10-19-82
Hearing Officer — (Date)

cc: [omitted in printing.]

No. 89-1240

MAR 23 1990
JOSEPH F. SAPNIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

ANTHONY WAYNE THOMPSON,

Petitioner,

v.

CHERYL L. DUKE, CHESTER J. PUCCI, FLOYD COX, ROBERT GUTHRIE, RITA ALLEN, HAROLD THOMAS, MICHAEL LANE, PAUL J. KLINCAR, PHILLIP T. HARDIMAN, ROY PATRICK, and THE COUNTY OF COOK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF STATE RESPONDENTS DUKE, PUCCI, COX, GUTHRIE, ALLEN, THOMAS, LANE and KLINCAR

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BEST AVAILABLE COPY

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No. 89-1240

In The

Supreme Court of the United States

October Term, 1989

ANTHONY WAYNE THOMPSON,

Petitioner,

v.

CHERYL L. DUKE, CHESTER J. PUCCI, FLOYD COX, ROBERT GUTHRIE, RITA ALLEN, HAROLD THOMAS, MICHAEL LANE, PAUL J. KLINCAR, PHILLIP T. HARDIMAN, ROY PATRICK, and THE COUNTY OF COOK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF STATE RESPONDENTS DUKE, PUCCI, COX, GUTHRIE, ALLEN, THOMAS, LANE and KLINCAR

The state respondents, Cheryl L. Duke, Chester J. Pucci, Floyd Cox, Robert Guthrie, Rita Allen, Harold Thomas, Michael Lane, and Paul J. Klincar, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Seventh Circuit's opinion

in this case. The opinion is reported at 882 F.2d 1180 (7th Cir. 1989).

STATEMENT OF THE CASE[1]

Petitioner, Anthony Wayne Thompson (hereinafter "Thompson"), brought this action pursuant to 42 U.S.C. § 1983 alleging that state respondents Duke, Pucci, Cox, Guthrie, Allen, Thomas, Lane, and Klincar[2] had violated his fourteenth amendment right to due process by failing to conduct, or to provide procedures for, a prompt preliminary parole violation hearing in this case.

In July 1982, Thompson was on parole in Chicago for a theft he had committed in Indiana (A11). He was arrested in Chicago on July 29, 1982, and charged with burglary; the following day he was incarcerated at the Cook County Jail (*id.*).

On July 30, 1982, Thompson appeared with his attorney at a hearing where bond was set at $50,000 and a preliminary hearing was scheduled for August 12, 1982 (App. 2). Also on July 30, Duke, a parole officer employed by the Illinois Department of Corrections (DOC), and

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[1] References to the record will follow the format set forth in footnote 1 at page 5 of Thompson's petition.

[2] This brief in opposition will be confined to Thompson's federal claims against the state respondents. Thompson also alleged state law causes of action for false imprisonment, which were dismissed by the district court upon its grant of summary judgment on the federal counts (App. 28). The county respondents are separately represented before this Court.

Pucci, a warrant officer and Duke's supervisor, issued a parole violation warrant against Thompson based on his arrest for burglary (A12).

The preliminary hearing was held as scheduled on the burglary charge (A12). Thompson was represented by counsel but presented no witnesses or evidence on his behalf (*id.*; App. 2). The court found that probable cause existed to believe that he had committed the burglary, and it scheduled a trial for September 20, 1982 (A12; App. 2). On August 31, 1982, an information was filed against Thompson charging him with the offense of burglary (A12). Respondents Duke, Pucci, and Guthrie, a hearing officer employed by DOC, scheduled Thompson's preliminary parole violation hearing for September 21, 1982 (*id.*).

Thompson was found not guilty of the offense of burglary on September 20, 1982, and was returned to the Cook County Jail (A12-13).[3] His preliminary parole violation hearing was not held as scheduled,[4] and, on

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[3] It is not clear when the state respondents first learned of the disposition of the burglary charge (see RG at 43, 48, 56). A finding of not guilty does not automatically mean that a person held on a parole violation warrant must be released (HT at 39-40, CP at 59, RG at 84, 98). Thompson's conclusions in his petition to this Court that his acquittal "obviously" required or "should have resulted in" his release do not address this evidence.

[4] The record does not explain why the hearing was not held as scheduled. Hearing Officer Guthrie explained at his deposition that a hearing officer would try to prioritize work, but that circumstances (*e.g.*, a disturbance at the jail) could prevent him from keeping to his schedule (RG at 58-59, 75, 121-22).

September 25, 1982, while incarcerated in the county jail, Thompson was assaulted by another inmate (A13). Thompson was taken to the Cook County Hospital for medical treatment and remained there until October 19, 1982 (*id.*).

He was then transferred from the hospital to the county jail at which time respondent Cox, also a DOC hearing officer, held a hearing, determined that no probable cause existed to believe that Thompson had violated the conditions of parole and recommended that his parole violation warrant be withdrawn (*id.* at 13, 623.) Thompson was released from jail that same day (A131).

Thompson's complaint alleged that respondents Duke, Pucci, Guthrie, Allen (Interstate Compact Administrator in Illinois),[5] Thomas (Guthrie's supervisor) and Cox violated his due process rights by failing to proceed, or cause others to proceed, with a parole violation hearing prior to the date when he was injured at the Cook County Jail (App. 3; A14-23). With respect to respondent Klincar, Chairman of the Prisoner Review Board (the state agency responsible for the grant, denial or revocation of parole), and respondent Lane, then Director of the Illinois Department of Corrections,[6] Thompson alleged that these respondents had promulgated policies causing the alleged constitutional deprivations that he suffered (A23-26).

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[5] The Compact transfers the supervision of probationers and parolees between states (RA 7-8).

[6] On January 16, 1990 Michael Lane was succeeded in office by Kenneth L. McGinnis.

In a memorandum opinion dated December 29, 1987, the district court held that the state respondents were absolutely immune from suit, characterizing these respondents' actions as administrative and relying on the holdings of *Walker v. Prisoner Review Board*, 769 F.2d 396 (7th Cir. 1985); *Trotter v. Klincar*, 748 F.2d 1177 (7th Cir. 1984); and *United States ex rel. Powell v. Irving*, 684 F.2d 494 (7th Cir. 1982) (App. 24-28). After the district court entered its judgment, this Court issued its decision in *Forrester v. White*, 484 U.S. 219 (1988), in which it declined to apply absolute immunity to a judge's decision to discharge his probation officer, describing that act as administrative rather than judicial. Analyzing and applying the *Forrester* decision, the Seventh Circuit rejected Thompson's contention that the duty to schedule and hold a timely preliminary parole revocation hearing was simply an administrative function. Rather, the court of appeals concluded that the duty to schedule and conduct a hearing "is obviously an integral judicial (or quasi-judicial) function subject to absolute immunity" (App. 10).

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE FIRST QUESTION PRESENTED IS PREMISED ON A MISSTATEMENT OF THE DECISION OF THE SEVENTH CIRCUIT.

In his first question presented to this Court, petitioner posits a conflict between the decision of the Seventh Circuit and this Court's ruling in *Forrester v. White*, 484 U.S. 219 (1988), by characterizing the conduct of the

state respondents as administrative. In fact, the court of appeals directly confronted the question whether the duty to schedule and hold a timely hearing is properly described as administrative or judicial, in view of the reasoning outlined in *Forrester*. A careful analysis of this Court's decision led the Seventh Circuit to re-affirm its earlier holding that activities that are part and parcel of the judicial (or quasi-judicial) process continue to be protected by absolute immunity, and to conclude that the scheduling and conduct of a hearing were an integral part of the judicial function. App. 10-11. Rather than address the reasoning of the Seventh Circuit, petitioner chose simply to assume the opposite conclusion and to frame his issue before this Court in terms of his own evaluation of the respondents' functions. As decided by the court below, this case presents no conflict with the *Forrester* decision.

II. THE FUNCTIONAL ANALYSIS AS APPLIED BY THE SEVENTH CIRCUIT AND OTHER COURTS RENDERS UNNECESSARY A BROAD-BASED DECISION AS TO THE EXTENT OF IMMUNITY GENERALLY AVAILABLE TO PAROLE OFFICERS AND PAROLE OFFICIALS.

Petitioner attempts to minimize the importance of "a parole officer in the Uptown parole office in Chicago, Illinois" as compared to other judicial or quasi-judicial officers long recognized to enjoy absolute immunity for their judicial functions (petition at 18). This superficial distinction does not confront the similarity of functions performed by all such actors, who are necessarily faced with the regular obligation to prioritize cases and deliver

prompt, impartial adjudications based on objective evaluations rather than the fear of litigation. Essentially refusing to acknowledge the purpose of a functional analysis, the petitioner suggests instead that this Court should use this case to decide whether parole officials and officers are generally entitled to absolute or qualified immunity (*id.* at 18-19).

To the extent that petitioner is attempting to isolate and distinguish the complained-of conduct by these state respondents from that of such officials generally, he fails to present a question of such importance as would require the exercise of jurisdiction by this Court. While petitioner also suggests that this Court grant certiorari to resolve a perceived conflict among the circuits as to the extent of immunity to which parole officials are entitled, this latter issue was neither presented to nor decided by the court of appeals in this case.[7] *See Tacon v. Arizona*, 410 U.S. 351 (1973). In any event, the functional analysis that must inform absolute immunity decisions obviates the need, and indeed the possibility, of blanket grants of immunity according to job title.

Petitioner has, moreover, failed to demonstrate a conflict among the circuits that requires the immediate attention of this Court. His reliance on *Wolfel v. Sanborn*, 691

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[7] The Seventh Circuit has long held that a parole board official should be accorded absolute immunity for his quasi-judicial conduct under the functional analysis mandated by this Court. *United States ex rel. Powell v. Irving*, 684 F.2d 494, 496-97 (7th Cir. 1982) *citing Sellars v. Procunier*, 641 F.2d 1295 (9th Cir.), *cert. denied*, 454 U.S. 1102 (1981), as well as comparable decisions of the Fourth and Fifth Circuits.

F.2d 270 (6th Cir. 1982), to establish a direct conflict with the Seventh Circuit's opinion in the present case, evidences less of a disagreement between the courts than an effort to infer a conclusion not reached by the *Wolfel* court. The cited decision is the latest of three appellate opinions in that litigation.[8] Read together, these decisions reveal that the issue of absolute immunity was never addressed by the reviewing court and, apparently, was not advanced by the defendants. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

The additional cases cited by petitioner are similarly unpersuasive of the existence of a serious conflict that this Court must resolve. In *Wilson v. Rackmill*, 878 F.2d 772 (3d Cir. 1989), *Harper v. Jeffries*, 808 F.2d 281 (3d Cir. 1986), *Farrish v. Mississippi State Parole Board*, 836 F.2d 969 (5th Cir. 1988), and *Nelson v. Balazic*, 802 F.2d 1077 (8th Cir. 1986), the reviewing courts all applied a functional analysis and acknowledged that parole officials were entitled to absolute immunity for their judicial or adjudicative functions. In *Galvan v. Garmon*, 710 F.2d 214 (5th Cir. 1983), the immunity of parole officials was not even addressed, as the issue presented was the level of immunity applicable to a function executed by a *probation officer* who allegedly caused the wrongful arrest and incarceration of a person on probation. Finally, of these five cases,

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[8] The first and second opinions are published at 555 F.2d 583 (1977) and 666 F.2d 1005, *vacated*, 458 U.S. 1102 (1982), respectively.

three were decided prior to this Court's decision in *Forrester,* and neither the *Wilson* nor the *Farrish* court even considered the possible impact of *Forrester* on the evaluation of the defendants' functions.

Petitioner has not demonstrated a significant conflict among the circuits on the basis of his cited cases. The reviewing courts should be allowed more opportunity to apply the *Forrester* decision before it is determined whether the further guidance of this Court is needed in evaluating particular conduct of quasi-judicial officers.

III. PETITIONER'S PRESENTATION OF THE SUBSTANTIVE QUESTION OF STATE RESPONDENTS' LIABILITY IS PREMATURE.

Because it concluded that the state respondents were entitled to absolute immunity from petitioner's action for damages, the Seventh Circuit did not even find it necessary to address these respondents' alternative claim of qualified immunity, much less consider the merits of petitioner's substantive claim of a deprivation of his constitutional rights by the state actors. Even assuming, *arguendo,* that this Court should choose to entertain a question regarding the absolute immunity of parole officers and officials, and assuming further that the state respondents would then be found not to have absolute immunity under the circumstances of this case, the issue of their substantive liability under the Civil Rights Act would still not be ripe for review before this Court. As was the case in *Forrester,* a remand would be required in order that these remaining questions be addressed in the first instance by the district court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

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